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Ronald J. Tabak

Skadden, Arps, Slate, Meagher & Flom

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ARE EXECUTIONS IN NEW YORK INEVITABLE?

*The Association
of the Bar of the City of New York
February 4, 1995*

INTRODUCTION

*Ronald J. Tabak**

One might suppose that the following presentation, an edited transcription of a February 4, 1995 program considering whether executions in New York are inevitable, has been rendered moot by the enactment on March 7, 1995 of New York's capital punishment legislation. However, that is not so.

The law that was enacted is so badly flawed that, wholly aside from whether the courts will hold that the whole concept of capital punishment violates the New York Constitution, it is highly unlikely that the law will survive judicial scrutiny. There will undoubtedly be future forums at which the law's problems will be discussed at great length. At this point, it should suffice to discuss three aspects of the legislation that have no precedent elsewhere, and are of extremely dubious constitutionality.

The first of these concerns sentencing. Under the new law, a defendant may plead guilty to first-degree murder "with both the permission of the court and the consent of the people," in which event, "the agreed upon sentence" will be "either life imprisonment without parole or a term of imprisonment . . . other than a sentence of life imprisonment without parole."¹ If, in the absence of a guilty plea, the prosecution decides not to seek the death penalty for first degree murder, the judge will decide between the following two sentences if the defendant is convicted: "life imprisonment without parole" or "imprisonment . . . other than a sentence of life imprisonment without parole."² If the State does seek the death penalty, however, the jury will decide between the

* Special Counsel, Skadden, Arps, Slate, Meagher & Flom, Coordinator of Pro Bono Program; Chair of the Committee on the Death Penalty for the American Bar Association's Section of Individual Rights and Responsibilities. The opinions expressed in this introduction solely represent the views of the author.

1. New York Death Penalty Statute, §§ 10 & 11 (1995)(amending CRIM. PRO. LAW §§ 220.10, subd. 5, (e) & 220.30, subd. 3, (b)(vii)) [hereinafter Statute].

2. Statute § 20 (adding CRIM. PRO. LAW § 400.27, subd. 1).

following two sentences: the death penalty or life without the possibility of parole. Furthermore, the jury will be instructed that if it does not unanimously agree upon one or the other of these two sentencing options, the judge will automatically impose a sentence that the jury has never considered: "a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life," i.e., life *with* the possibility of parole.³

Under this convoluted legislative scheme, innocent people for whom capital punishment is being sought will have an incentive to plead guilty, because that is the only way, absent a hung jury, that they can get a sentence with a possibility of parole. Moreover, whereas in most states the defendant cannot be executed if a single juror votes against the death penalty, under this statute, if a minority of jurors vote for life imprisonment without parole, they will undoubtedly come under intense pressure to vote for the death penalty—in view of the judge's instruction that if the verdict is not unanimous, the defendant will someday be eligible for parole.

This is irrational and will lead to arbitrary and capricious results. This sentencing structure apparently resulted from a compromise between the desire of Governor Pataki and the State Senate not to have life without parole as an option at all (as reflected in the first bill introduced in the State Senate), thereby inducing juries worried about parole to impose the death penalty, and the desire of the Assembly to carry out the recommendations of the New York State Bar Association, New Yorkers for Fairness in Capital Punishment and other groups, which recommended that life without parole be a sentencing option.

Another provision of the new law that seems patently unconstitutional is one that, on its face, discriminates against poor people. This is the section that enables district attorneys to request the Governor to require the Attorney General to assist in the prosecution or appeal of capital cases.⁴ A district attorney may request such assistance whenever the defendant is poor, and therefore is represented by appointed counsel, or whenever the defendant receives certain expert, investigative or other services at government expense. Yet, when the defendant is not poor and has paid for his own counsel, or has a wealthy friend who pays for his counsel, or somehow gets volunteer counsel, the district attorney cannot request the Attorney General's assistance unless he or she shows that the defendant "is able to marshal substantially greater legal and

3. Statute § 20 (adding CRIM. PRO. LAW § 400.27, subd. 10).

4. Statute § 34 (adding EXEC. LAW § 63-d).

investigatory resources than those reasonably available to the district attorney.”⁵ Thus, the district attorney can ask for the Attorney General’s help simply because the defendant is poor, even where the prosecution has far more attorneys and investigators than the defense, but he or she cannot ask for the Attorney General’s help where the defendant is a person of means unless the defendant’s resources are far greater than the prosecution’s. There seems to be no rational, nondiscriminatory justification for this distinction.

Another highly unusual provision of the new statute concerns the availability of counsel to an indigent person who may be so insane that he is incompetent to be executed. The United States Constitution forbids such an execution.⁶ Under the new New York statute, a proceeding to consider the death row inmate’s competency to be executed will be undertaken upon the filing of a petition, which “must be accompanied by an affidavit of at least one qualified psychiatrist or certified psychologist who, based at least in part on personal examination, attests that in the psychiatrist’s or psychologist’s professional opinion the inmate is incompetent and lists the pertinent facts therefor.”⁷ Yet, it is only *after* the filing of a petition with supporting affidavit(s) that the court will “appoint competent counsel experienced in the trial of criminal matters to represent” the indigent death row inmate.⁸ How a poor, insane death row inmate without a lawyer is supposed to secure one or more expert affidavits is, as far as I can tell, left to our imagination. While the statute authorizes various people to file the petition on the inmate’s behalf,⁹ there is no reason to believe that anyone without substantial financial resources could prepare the requisite petition and secure the requisite affidavit(s).

There are many other problems with the new law. Some of them are briefly discussed in my editor’s notes that appear in footnotes to the presentation that follows.

At this juncture, it is important to realize that the following presentation is more pertinent than ever. This is so because when the new law is overturned by the courts, it will be up to the Governor

5. Statute § 34 (adding EXEC. LAW § 63-d, subd. 1 (i),(ii)).

6. See *Ford v. Wainwright*, 497 U.S. 388 (1986).

7. Statute § 32 (repealing CORRECTION LAW Art. 22-B, adding new Art. 22-B § 656, subd. 2).

8. Statute § 32 (repealing CORRECTION LAW Art. 22-B, adding new Art. 22-B § 656, subd. 3).

9. Statute § 32 (repealing CORRECTION LAW Art. 22-B, adding new Art. 22-B § 656, subd. 2).

and the Legislature which are at that time in office to decide whether or not to enact a new death penalty statute, and, if they do, whether to make it even broader in scope than the present statute (as Governor Pataki has said he may propose)¹⁰ or to make it much, narrower, as advocated in an op-ed article co-authored by the very conservative Ninth Circuit Judge Alex Kozinski, which appeared in the New York Times on the day after the New York law was enacted.¹¹

The citizens of New York still have time to learn crucial facts about how capital punishment would really work in New York, and how it has worked elsewhere,¹² to consider the serious moral issues raised by religious leaders such as Pope John Paul II in the anti-death penalty portion of his March 30, 1995 encyclical¹³ and John

10. See Nicholas Goldberg, *A New Lethal Weapon for NY: Capital punishment added to crime-fighting arsenal*, N.Y. NEWSDAY, Mar. 8, 1995, at A5 (Governor Pataki "refused to rule out the possibility that he would later try to broaden the law—perhaps adding to the categories of crimes it covers. 'I'm certainly not averse to that,' he said.").

11. Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A21 ("The majority must accept that we may be willing and able to carry out 30, 40, maybe 50 executions [in the entire country] a year Once that reality is accepted, a difficult but essential next step is to identify where we want to spend our death penalty resources. Instead of adopting a very expansive list of crimes for which the death penalty is an option, state legislatures should draft narrow statutes that reserve the death penalty for only the most heinous criminals.").

12. An excellent new book about the failure of capital punishment in Florida quotes Ray Marky, the person in the Florida Attorney General's office who "helped write and . . . struggled to enforce" Florida's death penalty statute, and who "had given the prime of his life to making the death penalty work"; he says, "[F]rankly, if they abolished it tomorrow, I'd go get drunk in celebration." DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD* 408-409 (Times Books 1995). In late 1994, Judge Myron Love, the presiding judge in Harris County, Texas (which includes Houston), the county responsible for 10% of all executions in the entire country since 1976, said, "We are not getting what I think we should be wanting and that is to deter crime. . . . [I]n fact, the result is the opposite. We're having more violence, more crime." *All Things Considered* (NPR radio broadcast, Sept. 28, 1994).

13. In Pope John Paul II's encyclical letter, "Evangelium Vitae," the Pope stated, "[T]he nature and extent of the punishment must be carefully evaluated and decided upon and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today, however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically nonexistent. . . ." *Pope's Letter: A 'Sinister' World Has Led to 'Crimes Against Life'*, N.Y. TIMES, Mar. 31, 1995, at A12. As the New York Times indicated, this is a "notable shift in Catholic doctrine" and "is a move towards a ban against the death penalty. . . ." Celestine Bohlen, *Pope Offers 'Gospel of Life' vs. 'Culture of Death'*, N.Y. TIMES, Mar. 31, 1995, at A1, A13. As Joseph Cardinal Ratzinger stated, "On the death penalty, the encyclical marks an important doctrinal advance. . . . [The Pope's] reservations with regards to the death penalty are even greater than those presented in the [C]atechism." *Id.*; see also Comments of His Eminence, John Cardinal O'Connor, *infra*, at 564-571.

Cardinal O'Connor, to think about the transformed view on this issue of Long Island Railroad shooting victim, and former prosecutor, Thomas McDermott, and to review the cogent arguments against capital punishment being made by several of the State's leading prosecutors and present and former police chiefs from around the country.¹⁴ New York citizens will also be able to consider the financial implications, during a time of fiscal crisis, of spending tens of millions of extra dollars each year in seeking the death penalty.¹⁵ Moreover, they will have to be vigilant to protect the judicial independence of the state judiciary, which was subjected to preemptive warnings during the legislative sessions on the night the death penalty bill was passed.

There was no real debate over the death penalty in the 1994 New York gubernatorial campaign. People merely knew that one candidate favored it and one candidate opposed it. Sadly, there have been no legislative hearings concerning the death penalty at which non-legislators could testify in at least twenty-five years; the legislation enacted on March 7, 1995, was drafted in secret; and the final version was released on Friday, March 3, just a weekend before both houses of the Legislature voted for it on Monday, March 6. Moreover, there were no televised debates on whether the death penalty should be enacted in New York.

Unfortunately, most opponents of the death penalty did not organize at the grassroots level prior to the November 1994 election, because they expected Governor Cuomo to be re-elected. Nor did they organize effectively thereafter, because they felt that a bill would be rushed through early in the legislative session, before an effective grassroots effort could, in their view, be organized.

Under the present circumstances, anyone interested in the capital punishment issue should consider the following perspectives of Barbara Paul Robinson, His Eminence John Cardinal O'Connor, Dean John Feerick, Archibald Murray, Thomas McDermott, Lee Grant, Cessie Alfonso and George Kendall (as well as my interspersed observations). Those who are persuaded by these perspectives to oppose the death penalty will wish to participate in new

14. See Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25; Patrick J. Murphy, *Death Penalty Useless*, USA TODAY, Feb. 23, 1995, at 11A; Adam Nossiter, *Balking Prosecutors: A Door Opens to Death Row Challenges*, N.Y. TIMES, Mar. 11, 1995, at 27.

15. See Sam Howe Verhovek, *Across the U.S., Executions Are Neither Swift Nor Cheap*, N.Y. TIMES, Feb. 22, 1995, at A1.

efforts to express such opposition.¹⁶ Those who remain uncertain should ask for additional forums, press reports and televised debates on this issue.¹⁷ What no one—whether for, against or undecided about the death penalty—should do is to be apathetic and remain on the sidelines.

Our legislators enacted the death penalty even though a great many of those who voted for it are privately ambivalent about it or opposed to it, because they believed it would be politically suicidal to do otherwise. If that perception of public opinion is already incorrect, or becomes incorrect by the time the Legislature next votes on capital punishment, democracy and justice demand that everyone with opinions on this issue express their views and make their presences felt during political campaigns and at the ballot box. Meanwhile, the organized bar has the special responsibilities of continuing to provide public education, preparing briefs to the courts on the new law's constitutionality and interpretation, and leading the fight to preserve the independence of our judiciary.

Barbara Paul Robinson:

We are happy to welcome you to this Association. My name is Barbara Robinson. I am President of the Association, and I want to thank all of you for coming. The fact that you are all here today is forceful testimony to your concern about the issue of the death penalty. This Association has long opposed the death penalty, but it is likely to pass as law in New York State this year. That is what we are here to talk about.

I am sure those who favor the death penalty see it as the ultimate punishment for horrible crimes. Those who view the death penalty that way may not realize that our imperfect criminal justice system too often fails to punish the truly guilty.

The case of Jesse Dwayne Jacobs has recently been reported in the New York Times.¹⁸ This man was recently executed for the

16. See DeQuendre Neeley, *Fight to the Death: Rights groups vow to kill execution law*, N.Y. NEWSDAY, Mar. 12, 1995, at A17.

17. I did debate one of the February 4, 1995 program's audience members, Al Rodbell, shortly before the statute's enactment, before a local Democratic club. And on March 14, 1995, Attorney General Vacco and I presented our differing views on the New York death penalty law on CNN's "Larry King Live" broadcast, for about eighteen minutes (excluding commercials). But these do not substitute for full-length, televised debates. The Association of the Bar of the City of New York is prepared to host such a debate.

18. Linda Greenhouse, *Execution Stay Denied Man Who Texas Concedes Did Not Kill*, N.Y. TIMES, Jan. 3, 1995, at A13; see also Frank Murray, *Justices Vote 6-3 to Let Wrong Killer Die*, WASH. TIMES, Jan. 4, 1995, at A4.

murder of a woman. However, after convicting him of that murder and securing his death sentence, the prosecution turned around and said that, in fact, his sister had pulled the trigger and murdered the victim. She, too, was convicted, although she was not given the death penalty. In the context of that case, I quote Oliver Wendell Holmes, Jr., who said, "For my part, I think it a less evil that some criminals should escape than that the government should play an ignoble role."¹⁹

Human error in executing the innocent is just one of the arguments against the death penalty. You are going to hear more about that from the experts later. Studies show that the death penalty fails to deter violent crime.²⁰ It does not bring down the murder rate, let alone the overall crime rate.²¹ It is also extraordinarily expensive, far more than the cost of imprisoning someone for life—three times as expensive in Texas and six times as expensive in Florida.²²

Worst of all, it is imposed unfairly. Poor defendants, those with inadequate representation, are executed, whereas the rich are not.²³ And race plays a pernicious role. An African-American defendant who kills a white victim is twenty times more likely to be executed than an African-American who kills another African-American.²⁴

As I said, you will hear much more about this from the experts here today. I would simply like to urge you all to stay involved. We have a new committee on representation in capital cases, headed by Eleanor Jackson Piel, who is here today. She needs volunteers to take on existing cases in the thirty-seven states which already have the death penalty. The Committee on Civil Rights, chaired by George Madison, and our Council on Criminal Justice,

19. *Olmstead v. United States*, 277 U.S. 438, 469-70 (1928) (Holmes, J., dissenting).

20. See SIXTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, CAPITAL PUNISHMENT: WORKING PAPERS PREPARED BY THE SECRETARIAT, 87-9 § 65 (1980) (a United Nations study has concluded that the death penalty has no demonstrable deterrent effect).

21. See *id.*

22. Christy Hoppe, *Execution Costs Texas Millions*, DALLAS MORNING NEWS, Mar. 8, 1992, at A1; David von Drehle, *Capital Punishment in Paralysis*, MIAMI HERALD, July 10, 1988, at A1.

23. It is estimated that 90% of the people on death row cannot afford lawyers. John Conyers Jr., *The Death Penalty Lottery*, N.Y. TIMES, July 1, 1985, at A15.

24. See Erik Eckholm, *Studies Find Death Penalty Tied to Race of the Victims*, N.Y. TIMES, Feb. 24, 1995, at B1 ("[O]ver the last 18 years, 88 black men have been executed for killing whites, while only two white men have been executed for killing blacks.").

chaired by Barbara Jones, will also be working on these issues, as will a special independent committee. Ron Tabak, who of course we all thank for organizing this program, is a key player. So, thank you, Ron, and thank you, Norman Greene, Chair of our Committee on Continuing Legal Education, who is also here. Thank you all for coming.

It is now my great pleasure and privilege to introduce to you His Eminence John Cardinal O'Connor. We are extraordinarily honored to have him here today.

In introducing him, I would like to quote from another great man, Justice Benjamin N. Cardozo, who said, "The death penalty will seem to the next generation, as it seems to many even now, an anachronism too discordant to be suffered, marking with grim reproach all our clamorous profession of the sanctity of life."²⁵ Cardinal O'Connor is clearly one of the great leaders in the next generation who has spoken and continues to speak eloquently of the sanctity of life and in forceful opposition to the death penalty.

We are very happy and fortunate to have him here and to have him come to the New York scene, which he did in 1984. No doubt his many years of service in the Navy and the Marines in both Korea and Vietnam reinforced his profound commitment to the sanctity of life. We are all tremendously grateful that he blesses us today with his presence here. Your Eminence.

His Eminence John Cardinal O'Connor:

Thank you, Barbara, very, very much. You are very kind and gracious.

There are others who will be speaking today who have researched these issues much more extensively than I and can speak from various professional perspectives, therefore, the only role I have here will be to articulate what the Church teaches about capital punishment. My personal opinions are of no special importance.

There is a great deal of confusion today about what the Church teaches. Indeed, I have been getting a number of letters asking me how it is that the bishops can be preaching against the use of capital punishment. The letters tell me that the *Catechism of the Catholic Church* justifies the use of capital punishment. Consequently, even about Church teaching there is considerable confusion. I have read some of that confusion in newspapers and editorials, in

25. BENJAMIN N. CARDOZO, *LAW & LITERATURE*, 93-94 (1931).

letters to the editor. All that I can do is to try to clarify what the Church teaches. That is my obligation as the Archbishop of New York.

Church teaching relative to capital punishment has a certain relationship to Church teaching relative to war. The Church still teaches that it is possible, theoretically, to engage in a "just war". But "just war" teaching was designed not to make war probable, but to try to preclude it completely. "Just war" teaching is highly restrictive so that one must have satisfied a great number of restrictive principles before one can consider going to war. One of these principles is that every conceivable, peaceful means of negotiating conflict must have been exhausted.

Some have accused the Church of sanctioning war almost casually. That is an absurdity. For several Sundays in St. Patrick's Cathedral prior to our entrance into the Gulf War, for whatever it was worth but in accordance with Church teaching, I begged and pleaded that we not enter the Gulf unless every other means of negotiation had been categorically exhausted.

There is a certain parallel here to the use of capital punishment. The new *Catechism of the Catholic Church* and traditional Church teaching make clear that the state, having the requirement to defend its people, has the *right* to use capital punishment to defend its people *if* all other means are exhausted, most particularly bloodless means.

Recently, I had an experience that highlighted for me the need for meticulous analysis of all variables when considering capital punishment.

A young Marine corporal in Vietnam almost certainly saved my life many years ago. (His doing so has been controverted by many people in New York. But he did it, not realizing what I would perpetrate on the people of New York years later!) He went on to become the Chief of State Police in a particular state in the United States. One night he called me. He said, "Father, (he always called me "Father" from our time together in Vietnam) I am a Southern Baptist, but I know the arguments you raise about the sanctity of human life. Now I have a very serious problem. The governor has promoted me to the board that reviews the sentences of those who have been sentenced to death. There is a notorious murderer in this state. I listened to the entire trial. I have had many, many years of police experience and there is no doubt whatsoever in my mind that this man is guilty, not only of a number of murders, but of unspeakable brutality, torturing his victims before he murdered

them. I am having a terrible struggle in conscience because I am very close to the governor and I know that my word will influence him very much. It looks to me that the board is going to vote that he be executed. Would you tell me what your Church teaching is?"

I explained to him the teaching of the Church on capital punishment. The new *Catechism of the Catholic Church* is very specific. It says that the state has the right, it has the duty to defend its people against unjust aggressors, and if this defense, in the judgment of the state, requires the use of capital punishment the state has that right "if bloodless means" have been exhausted, if there is no other way to defend the people. Then he asked what I personally thought. I said, "This is our teaching. You have your conscience. Whether Southern Baptist or Catholic, you are familiar with the circumstances. I am not. You have to make your judgment before God and be at peace."

Just about a year ago he himself died of cancer. He died at peace. He had decided to recommend to the governor commutation of the death sentence to life imprisonment. That was his judgment. In accordance with Catholic teaching we are free to make that judgment, but we have a grave obligation to examine all of the circumstances.

In 1984, I presided at the funeral of the first woman police officer killed in New York in the line of duty. Her name was Irma Lozada. As I stood out in the street after the Mass blessing the casket as it was being placed into the hearse, I could hear the murmurs around me. I could understand the deep feeling that there should be an "eye for an eye" and that the killer of this policewoman should perhaps be put to death.

It is very easy to understand this. I think that it is so very important that those who are opposed to the use of capital punishment understand why people are calling for it, particularly when we are speaking of a police officer. By its nature the police force exists to defend society, to maintain order. If the police are as vulnerable as anyone else to being killed then all of society can be thrown into chaos. It is understandable that there has been enough of this to justify a call for the death penalty. But can this be the end of the discussion? I do not think so.

Permit me to read something that I wrote a few years ago in conjunction with that particular event. I asked, "What is beneath this call for a return to the death penalty?"

Frustration—furious, driving, bitter, bitter, understandable, frustration born of so many wild and maddening forces. My

loved one is dead, dead at the hands of a murderer. No one can bring back my love, fill the terrible emptiness in my soul. I am a mother, a father; they have killed my son, my daughter. I am a husband, a wife. They have taken my life. I am a widow. Who will support me? Who will help me rear my children?

And in the meanwhile, hundreds of millions of dollars—billions—change hands in drug traffic. Guns pour off the assembly lines in incredible numbers, millions unlicensed, uncontrolled [here and elsewhere].

. . . [D]rug pushers allegedly have arsenals far more powerful than those of the police, so that [often] the police [are unable to break up drug dealing].

In other words, I can be killed, my daughter raped, my children mutilated, and I have no defense. The system doesn't work. It simply doesn't work. Whether it's corrupt, or indifferent, or incompetent, it doesn't work. I can't stand it. I can't, I won't accept it. Someone must be punished. I must have justice for what has been done to my family, to my life. I can accept nothing less than a life for a life.

Who could argue against that frustration? It is perfectly understandable, in my judgment. Yet, sympathetic as I am with such feelings, the bishops of the United States have consistently urged against the use of capital punishment and I have been one of them. The bishops of the State of New York are confronted now with precisely what you are confronted with, the indications that the governor will push for the return of the actual use of capital punishment. It seems quite conceivable that the legislature will pass that legislation. We feel in conscience that we have an obligation to the many people, Catholics and others in our society, even if they don't agree with us on much of our teaching, to enunciate moral teaching with consistency, that is especially true when one is in the communication center of the world. The bishops have to be very clear and very specific.

Let me tell you explicitly what the *Catechism* has to say. It was just recently published in English. It has tried to bring together almost 2000 years of Catholic teaching. The *Catechism* is quite clear in underlining that the state has the right to use the death penalty, however the *Catechism* also tells us that bloodless means must have been exhausted.

Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the

right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. . . .

[2266]

The *Catechism* goes on to say:

If bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons, public authority should limit itself to such means, because they better correspond to the concrete conditions of the common good and are more in conformity to the dignity of the human person.

[2267]

This is what the bishops are arguing—it's a question of the dignity of the human person.

Why do the bishops hold this position? Why does the *Catechism* hold this position? I think there are two categories of reasons. The practical or pragmatic, if you will, on the one hand, and the philosophical or theological on the other. We say the same thing to Catholics, to those of other religious persuasions or of none. There is no requirement that you agree with the bishops. It is a judgment call on the part of the bishops, but we do not accept the censure that we are fuzzy-headed or naive about crime.

There are *practical* reasons for the position of the bishops. Despite extensive studies one can still argue that the death penalty has not been effective in deterring capital offenses. I have read the arguments and if anything the arguments lean a little bit toward the notion that the death penalty is effective and that must be admitted. But there is enough argument to the contrary that one can take the side that the bishops do.

The questions about effectiveness arise for a variety of reasons. Many, many murders are committed out of sheer madness. I am not judge and jury in the case on Long Island now, but how can anyone go into a subway train or the Long Island Railroad, as occurred a year or so ago, and kill so many people without being mad? That is for a judge and jury to decide, not for me. But I ask the question, how could someone push an unknown lady into an onrushing subway train to her death without being mad? I have a background in clinical psychology. I have dealt with many terribly disturbed people. I do not see how anyone could do that without being at least temporarily mad. It is difficult for me to believe that

madness is not at work. Capital punishment can hardly be expected to deter madness.

Clearly there are so many capital offenses attributable to drugs today. How many people do what they do under the influence of drugs? Would capital punishment deter this? It might. The bishops have come to believe that it would not.

Then there are many who are calloused. Anyone who deals frequently with crime—I think virtually any police officer who deals with serious crime—can tell you about the number of people who become calloused to the very nature of life, including their own lives. They do not care whether they live or die. Police officers today tell me about kids who are brought into a police station after having killed people and they are contemptuous. They laugh; they are not scared of death themselves. They laugh at the thought of capital punishment. This kind of callousness leads to a darkness of mind, we would say in our teachings, a darkness of conscience, so that we can no longer even distinguish between right and wrong. We have a society in which there are a tremendous number of people who have not been brought up to distinguish between moral right and moral wrong. Maybe they know something about what is declared to be legally right or legally wrong, but moral right and moral wrong? The words are not in their vocabulary.

There does not seem to be any doubt statistically that the majority of those sentenced to death are either minorities or are very poor. Of course it is immediately noted that the greater number of capital offenses are committed by minorities. This may be so, but the statistics indicate that even if one accepts that equation, there is a disproportionate number of minorities guilty of capital offenses who are sentenced to death than those who are not minorities. Clearly, as has been brought out in a number of very widely publicized murder cases recently, those who can afford extraordinarily skillful defenses are in a much better position to avoid the death penalty or other kinds of serious punishment than those who are very poor. I personally believe that just as we have to exhaust every means before we even think about using capital punishment, so we have to exhaust every defense for the person accused, however much it costs, however long it takes.

Then there is the fact that mistakes can be made. There can be mistakes in identification. A mistake is irreversible when a person has been put to death.

For these and various other pragmatic reasons the bishops have urged that we go very slowly, that we think this through more care-

fully and prayerfully and that our response not be dictated by understandable passions and emotions. I have just signed a petition with clergy of all religious persuasions in the State of New York pleading with the legislature to put a moratorium on any legislation supportive of the death penalty for the minimum of a year.

There are also what I would call the *philosophical* or *theological* reasons for opposing capital punishment.

There has been brought about, I think, a desensitization of a sense of the sacredness of human life in our culture in so very, very, many ways. One could argue that if I permit an innocent person to be killed and do not severely punish the killer then I have ignored the sacredness of the human life of the innocent person. We are not talking about ignoring severe punishment; we are talking about the death penalty. That is something quite different. The bishops are not arguing that we should open up our jails and everybody should go free and we should bring in social workers, which I say with due respect, and the most hardened criminals and murderers will be coaxed into a totally new attitude toward life. That is not what we are talking about. Again, it is not for us to determine what constitutes the most effective form of punishment. We believe that punishment, in accordance with traditional thinking, must fit the crime. But when you say that, you must remember that the crime is a crime against the people and the purpose of the punishment is to defend the people.

We have developed in the United States an ethic of death. We seem to be poised on the legalizing of euthanasia, of assisted suicide. Death becomes the quick fix. Death becomes the easy answer, the answer to every problem. This person is terminally ill with cancer so put her to death, put her out of her "misery".

I am responsible for a big cancer hospital here in New York. It is considered to be one of the best in the United States. We take only those people who are declared terminal. They come to our hospital to die. But because of palliatives recently discovered by the medical profession, because of new ways of treating *pain*, not cancer, we can give people a lot of comfort, relieve them of their misery, let them visit with their families, their friends, make provisions for death, both financial and spiritual. Some can even go home for periods of time. I am told that one major insurance carrier has warned us that if we continue to keep those people alive we may be subject to losing our insurance.

So death has become the quick fix. This person wants to die for whatever reasons, so let him die, that is his "right." Death be-

comes the easy answer to everything. That is the way it has become with abortion. This woman is pregnant and does not want to be pregnant for many understandable reasons. This girl who is a teenager has her life ahead of her, has her schooling ahead of her, her parents do not want her to bear the child she has conceived without benefit of marriage. So what is the quick fix? Put the baby to death. That is very understandable. I have never condemned any girl or woman for having an abortion. I understand it, but I say it is wrong. How easily we fall into this ethic of death!

Perhaps as important a philosophical reason as any other is that the use of capital punishment lulls us into believing that we are solving the crucial problems of our society by putting to death its seemingly worst offenders, murderers and rapists, for example. But what do we really solve? Are we *facing* the critical problems of our society?

We have generally accepted violence as a way of life. We accept it on television. We accept child abuse which borders on the lethal. We accept television programs which psychiatrists tell us can turn school playgrounds into killing fields. We accept all that and sometimes we even revel in it, in our movies, in our television programs. Do we desensitize ourselves to violence?

For me a crucial question about capital punishment is this: is it a quick fix capable of lulling us into believing that we have solved problems that we simply refuse to face?

I thank you for having this symposium. I feel deeply about this and I am grateful for this opportunity to share my thoughts.

Ronald J. Tabak:

Good morning. I am Ron Tabak, President of New York Lawyers Against the Death Penalty. I wanted to thank, on behalf of the Association, His Eminence John Cardinal O'Connor for that inspiring talk. It really was beyond our expectations, and our expectations were high with regard to what His Eminence would be able to bring to us today in terms of the moral perspective on capital punishment.

We would now like to ask those of our panel members who are here to come onto the stage. We are going to begin a program in which we will discuss the legal aspects of what the state of New York would be buying into if it had capital punishment; what the experience is in other states that have had the death penalty; what some of our leading legal services and bar associations have to say about it; and what our artistic community has to say about it.

The first speaker I will call upon will be, most appropriately, last year's recipient of the St. Thomas Moore Award of the Lawyer's Division of Cardinal O'Connor's Committee of the Laity. John Feerick is now the Dean of Fordham Law School where, as a student, he was Editor-in-Chief of the Fordham Law Review. My law firm would say that his greatest distinction is having been an associate and a partner at Skadden, Arps, Slate, Meagher & Flom. But we are also proud of his further accomplishments, such as his being an author of books concerning presidential succession and the Vice Presidents of the United States,²⁶ his work on labor relations matters, including trying to solve various strikes, and his being the Chairman of the New York State Commission on Government Integrity. He has received numerous awards, too many to mention here, and he is the immediate past President of this Association. So it is with great pleasure that I welcome Dean John Feerick.

Dean John D. Feerick:

Thank you very much. I appreciate the generosity of the introduction.

I feel somewhat redundant after His Eminence. This is not a subject that I have been engaged in, certainly in terms of my life's work as a lawyer. It is a subject that I have followed. About a month ago, Ron Tabak asked if I would participate in the program. I was not sure there was anything I could really add since I am really not an expert in this area, but I have thought about the subject and feel that this is a time for all of us to express ourselves on this issue. Hence, I have put together a very short statement that, as I say, is somewhat along the same lines as His Eminence and hence might be viewed as redundant. But I do occupy a position as an educator and as a member of the legal profession, and I am happy to state where I stand on the subject.

I oppose the rush that I see taking place to reinstate the death penalty for three reasons: a personal reason, a constitutional reason and a philosophical reason.

The personal reason: I grew up in a home, was educated in a school system, and belong to a faith community where the dignity of human life is expressed as a paramount value. Indeed, it is the most precious thing we have. I, therefore, approach the subject of today's program from that perspective. I question the wisdom of

26. JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (Fordham Univ. Press 2d ed. 1992); *FROM FAILING HANDS; THE STORY OF PRESIDENTIAL SUCCESSION* (Fordham Univ. Press 1965).

reenacting the death penalty in New York State, which has stood for a long time as a leader in its opposition to the death penalty.

Death imposed by other human beings is, as I see it, the ultimate degradation of human life. It has been said by others that it is for the law to give and it is for the law to take. And in the final analysis at the personal level, I accept that as a basic truth.

Second, from a constitutional standpoint, it is not at all clear to me that the death penalty can pass muster under either the federal Constitution or our state Constitution, which confers rights that exceed even the federal Constitutional protections. I find highly persuasive the reasons given by a majority of the United States Supreme Court in its 1972 decision in *Furman v. Georgia*, which declared all existing death penalty laws unconstitutional.²⁷ I recognize that subsequent Supreme Court cases upheld a new generation of death penalty laws.²⁸ But the reasons given in *Furman v. Georgia* remain compelling to me when one considers (I would like to mention five factors which have already been touched on by His Eminence): 1) the number of innocent people who receive capital punishment, 2) the fact that the death penalty is not a particularly effective deterrent, 3) the disproportionate impact of the death penalty on racial minorities, on the uninformed and on the poor, as has already been pointed out by both His Eminence and Barbara Robinson, 4) the huge cost and inefficiencies associated with the imposition of the death penalty, and 5) finally, judging by our country's past history, the likely infrequency with which the death penalty will be used in practice, thereby giving rise to serious issues of arbitrariness, prejudice, and unequal application of the law.

Those are legal questions, constitutional questions—and serious ones. The frustration we feel over crime is real and needs to be responded to by our public officials. I understand that. His Eminence has already touched on that. But there is no proof from the long history of the death penalty that it has served as a strong social or public policy. Why isn't imprisonment without parole the more appropriate, efficient and effective response to a grave crime, and why shouldn't we be placing our emphasis on ways to deal with the sources of crime?

Finally, my last reflection, I suppose, could be described as a philosophical reflection. I sense in the country today an anger and

27. *Furman v. Georgia*, 408 U.S. 238 (1972).

28. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Pulley v. Harris*, 465 U.S. 37 (1984); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

meanness that seem to want to hurt people. I believe that the death penalty is being influenced by this current, which, for me, argues for caution and restraint. Violence can only beget violence and move us away from the basic decency of our country and the supreme value we have always placed on each person's dignity. As Justice Stewart noted in *Furman*, "The penalty of death is an absolute renunciation of all that is embodied in our concept of humanity."²⁹ It is seriously doubtful whether we as a society can kill without doing psychological damage to our culture.

For all of these reasons, I oppose the current rush to judgment in New York State. Thank you.

Ronald J. Tabak:

Thank you very much, Dean Feerick. I should note in connection with the reference to *Furman v. Georgia* that two of the Justices who dissented in *Furman* and who then were part of the majority in *Gregg v. Georgia*,³⁰ when the death penalty was held to be constitutional, Justices Blackmun and Powell, have now stated that they view the death penalty as unconstitutional in every case. Justice Blackmun, just before leaving the Court, said that he would no longer be part of what he called "the machinery of death" and would dissent in every death penalty case because the death penalty is hopelessly arbitrary, capricious and unfair.³¹ Justice Powell was quoted in Professor Jeffries' biography of him³² as stating that the biggest mistake of his career was having had anything to do with—no less being the author of—the *McCleskey* five-to-four decision holding that even if there is a substantial pattern of racial discrimination in implementing capital punishment, that does not violate the Constitution.³³ Justice Powell also told Professor Jeffries that if he had it to do over again, he would vote against the death penalty in every case.³⁴

We are now going to turn to two speakers who have particular perspectives on New York. The first of them has a longstanding background in this area.

29. *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

30. 428 U.S. 153 (1976).

31. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J. dissenting).

32. JOHN CALVIN JEFFRIES, JUSTICE LEWIS F. POWELL, JR. (Charles Scribner & Sons 1994).

33. *Id.* at 451-52; *McCleskey*, 481 U.S. at 308.

34. JEFFRIES, *supra* note 32, at 451.

Archibald R. Murray is the Chair of the Board of the Legal Aid Society, a private non-profit agency of approximately one-thousand lawyers engaged in providing legal services to the poor in New York City. Mr. Murray attended Howard University and earned his law degree from Fordham University School of Law. He began his legal career as an assistant district attorney in New York County. He was invited later to join the legal staff of Governor Rockefeller, where he had principal responsibility for criminal justice and mental health issues. During the time he worked for Governor Rockefeller, the last execution that took place in the State of New York occurred.³⁵ Although its occurrence was not caused by Archibald Murray, he did live through that experience. Mr. Murray returned to New York City, where he joined a small Manhattan law firm. He reentered government in 1968 to help establish a new agency that made government grants to support criminal justice reforms. In 1972, he persuaded Governor Rockefeller to press for legislation which resulted in the creation of the Division of Criminal Justice Services, of which he became the first commissioner in 1972. In 1975, he became the executive director and attorney-in-chief of the Legal Aid Society, a position he held until 1994, when he was named chair of the board. Mr. Murray is the immediate past president of the New York State Bar Association. He has been a member of a number of state bar committees, including the committee responsible for evaluating Court of Appeals nominees. He has been the chair of this Association's Executive Committee, as well as vice president and secretary. He has served on the State Commission on Revision of the Penal Law. He is a trustee of Fordham University. He has been a trustee and vice chair of Columbia University. I do not need to note all of the awards he has received because with these accomplishments, one would expect that he would receive numerous awards. There could hardly be anyone more qualified to talk about the implications of having a death penalty in New York State than our next speaker, Archibald Murray.

Archibald Murray:

Thank you very much, Ron.

I will not go into a long dissertation, but, rather, give you a few remarks on my own personal views on this matter. I have been

35. Abraham Abramovsky, *The Death Penalty: An Unnecessary Measure*, N.Y.L.J., Dec. 10, 1994, at 3.

asked to say something concerning my own views on the subject of capital punishment.

To begin, capital punishment is not the panacea which its supporters seem to believe it is. There is no evidence that capital punishment deters persons who want to commit crimes.³⁶ Beyond that, capital punishment is a barbaric practice, a practice that should not be sanctioned or engaged in by any civilized state.

It is generally believed that the Legislature will very shortly reinstitute capital punishment in this state.³⁷ It is therefore necessary to put forward promptly all of the reasons why capital punishment is a very bad idea. Capital punishment will be expensive. In two states that have it, the cost of bringing a capital case to conclusion has been found to exceed two million dollars. In one instance, it's \$3.2 million; in another, it's \$2.3 million.³⁸ Before this measure is adopted, fairness and the interests of full disclosure require that the proponents first put before the public all of these facts, including its expense.

The death penalty appears to be applied unevenly. One study by the General Accounting Office found that the likelihood of being charged with capital murder or receiving the death penalty is influenced by the race of the victim.³⁹ According to a report by a House Judiciary Subcommittee, "89% of the death sentences carried out [in 1993] involved white victims, even though 50% of the homicides in this country have black victims."⁴⁰

The criminal justice process in this country is not the precise, scientific, infallible machine for determining guilt that the death penalty's proponents say it is. It is bad enough when someone is found to be incarcerated unjustly, although that failure can be rectified. Capital punishment, however, is final and irrevocable. The thought of taking the life of one innocent person is abhorrent and cannot be tolerated.

36. Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1675-76 (1986).

37. *Editor's Note: The statute was enacted on March 7, 1995. James Dao, Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1; see *Around the Nation*, WASH. POST, Feb. 17, 1995, at A2.

38. See Hoppe, *supra* note 22; von Drehle, *supra* note 22.

39. U.S. GENERAL ASSEMBLY OFFICE, DEATH PENALTY SENTENCING RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES, (Feb. 1990), reprinted in 136 CONG. REC. S 6889-90 (daily ed., May 24, 1990).

40. STAFF REPORT OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY, RACIAL DISPARITIES IN FEDERAL DEATH PENALTY PROSECUTIONS 1988-1994, at 6 (March 1994) (footnote omitted).

If there is, nevertheless, a capital punishment bill adopted, we must see to it that every precaution to prevent wrongful application of the death penalty is observed and pursued. In considering how to accomplish this objective, I suggest we look at Article Four of the New York State Constitution.⁴¹ It gives the Governor rather substantial powers and authority to deal with capital crimes, but there is almost no provision for procedural due process. Perhaps we can develop some law in that area if capital punishment does become the law of this state. Thank you.

Ronald J. Tabak:

Thank you very much, Mr. Murray.

Our next speaker is one of the most intriguing of our speakers today. Thomas McDermott is a practicing attorney in Garden City, Long Island, and we are very pleased that he has made the trip in from Garden City to come here in the snow storm today. He is married and the father of two children.

Tom served in the Army from 1967 to 1969, including a tour of duty in Vietnam. He is a graduate of the Marist College in Poughkeepsie and St. John's University School of Law.

Upon his graduation from St. John's, he was appointed a special assistant attorney general in the Office of the Special State Prosecutor for the Investigation of the New York City Criminal Justice System. Then, in 1977, he was appointed an assistant district attorney in Nassau County, and thereafter became the deputy bureau chief of the Official Corruption Bureau through 1981, when he left to enter private practice.

Mr. McDermott was on the Long Island Railroad train on the day of the events that are now being tried in Nassau County and was one of the people injured in that attack. Prior to that attack, he had been in favor of the death penalty, but in the wake of that event he learned a great deal about the subject and, based on what he has learned, he is now opposed to the death penalty.

I first heard of Thomas McDermott when he called me up a short time ago. He said that Sister Helen Prejean, the author of the book *DEAD MAN WALKING*,⁴² whom I have known since 1984 when she was the spiritual advisor to Robert Lee Willie (whom I had represented in federal habeas proceedings), had suggested that he call me and ask whether he could do anything in opposition to

41. N.Y. CONST. art. IV.

42. HELEN PREJEAN, *DEAD MAN WALKING* (Random House 1st ed. 1993).

the death penalty. I told him that he could appear on this program today, which he has agreed to do.

I think you will find very interesting what he has to say. Here is Thomas McDermott.

Thomas McDermott:

Thank you, Ron. Good morning, ladies and gentlemen.

As Ron said, I called him approximately a month ago, in somewhat of a lull in my activities as a gun control advocate, and asked if I could be of any assistance. That is why I am here this morning, to see if I can indicate the transformation that took place in my personal life.

Prior to December 7, 1993, I was a part of that majority of New Yorkers which favored capital punishment. I had never really given it any thought, research or detailed attention. I figured it has got to be a valid punishment; there has got to be an eye for an eye, and if someone is convicted of a vicious murder, then he or she must pay with his or her own life. I never really had any conviction that the penalty, if reinstated in New York, would in any way deter—having a cursory knowledge of the experiences in other states that have the death penalty, and reading that they certainly have not, with the existence of the death penalty, cut down on the number of homicides.

But then the occurrence of December 7, 1993 changed my life entirely. In order for you to get a sense of the three hundred sixty degree turn that I did, I would like to tell you just a few details of the incident on the train, without in any way trying to be gory or revolting. Approximately one hundred of us were on Car #3. Returning from the City after a day's work, I, like others, was dozing off, relaxing. Suddenly, gunfire erupted. I quickly realized that the shooting was gunshots, after first thinking that the sound of the cracking had come from stones hitting the windows of the train.

Panic and chaos broke out, with people who had been standing in the aisles fleeing away from where the gunshots were occurring. I, at that point in time, after realizing there was gunfire, could not see what was going on. After the people in the aisles had fled away from the gunfire, and the two gentlemen next to me were able to stand up to try to get away, I first saw the gunman. He had first reloaded, and at a distance of eight to ten feet away, he looked at me and I looked at him, and he raised the gun in his right arm and I realized he was going to kill me. I was, only through the grace of

God, able to get into the aisle and protect my head by turning away from him. I was shot in the shoulder.

I then dove to the floor of the car and had the presence of mind to put my head underneath the seat. My trunk and legs were still extended into the aisle. As moments went by, he walked up and stopped. I could see his feet. I could see his legs. He stopped at the aisle. I just held my breath. I said to myself: "Play dead. Play dead." Then, two more gunshots rang out and I said, "Oh my God, make it quick!"

At that instant, there were only two people in the entire world: he and I. I knew I was going to die. I was not going to get off that train. There was only one thought that went through my mind, and that was, "Oh God, make it quick!"

Two more shots rang out. I said, "Oh God, I'm never going to say goodbye to my children." A moment or two went by, and I opened up my eyes. Then, I could see him walking away from me toward the front of the car, and with that I said, "Oh my God, I'm alive!"

Then I got up, and I had the sense that the car of the train was going to stop, that he was going to continue shooting, that he was going to shoot everyone else and then come back and find out that he had not killed me. I went to the back of the car, where the original shots had rung out from, and I will never forget that sight. It was a small area, seven rows, and the density of the smoke from the gunshots was thicker than a fog. I still had not realized what had taken place back there. I remember recoiling from the stench from the gunpowder. Then, as I looked around, I said, "Oh my God, he's killed everybody!" There was not a person standing. Everybody, it seemed, was shot. They were leaning onto one another on the seats. They were on the floor. I realized I was witnessing a battlefield.

With that, I turned to see where the emergency brake was. It was in a panel in the side of the car. I got a little disoriented, and the gunshots were still going on toward the front of the car. Then I sensed that the train was slowing down. I turned to my left and I could see in my eye the elevated platform of the Merlin Avenue station, and I got a sense that we were slowing down.

As I was then able to turn around, he had already been tackled and restrained. I walked to the front of the car, past where he had been apprehended and where he was being restrained. As I was looking into the seats, I had no idea where I was going to go, but I know I walked to the front. The bodies in the seats had head shot

wounds, shoulder wounds, chest wounds. I finally got to the front of the car. At that point, a young man from Car No. 2 had come into our car, and I was the first one that he saw. He was able to assist me and sit me down. Thereafter, the medical emergency people and others arrived, and I was transported to the hospital.

At the hospital, my family members were there. My wife, my son and in-laws, neighbors, etc., so I was very fortunate. The doctors informed me right away that I would not even need an operation, that the bullet had entered and exited cleanly. As a matter of fact, I remember the surgeon in charge saying he had treated hundreds of gunshot wounds over nine years and that this was the cleanest one that he had had the occasion to experience. I was discharged from the hospital in three days' time.

As I was home recuperating—I did not return to work for several weeks—I became engulfed every day, from when I got up in the morning until I retired at night, with hatred and bitterness for this gunman. It went on hour after hour, every day. After about a week—in the interim, my daughter had returned from college, she is up at Rhode Island College—my wife came outside one night. I was walking in the backyard and she said, "You've got to stop this. The kids are getting worried for you. They know that you want to kill this man. They know that you want to kill him." I said, "He wanted to take my life. Not only did he want to take my life, but he wanted to take me away from my two children." She said, "Well, listen, they're afraid." I said "OK."

A couple of days went by and I, then, relaxed to the degree that I was able to say, "Listen, am I going to allow myself to become so poisoned with hatred that is so white hot and so unimaginable? That's not going to do me any good. That's not going to do my family any good."

A number of us who had survived had been in phone contact. When we met for the first time, I learned that the others were going through similar experiences, in different levels and different depths. The first five or six of us had agreed to try to do something for ourselves, for our families, and to get involved in seeing if we could do anything with respect to gun control. We agreed to do so.

We became active with respect to the bill that was passed by the Assembly in 1994.⁴³ We were asked by Governor Cuomo's staff to see if we could do anything with respect to the Senate voting on the bill, the Assault Weapons Ban Bill banning fifty-four weapons.

43. Maureen Fan, *LIRR Victims: Ban Assault Weapons*, *NEWSDAY*, Mar. 9, 1994, at 29.

Something which we were particularly interested in was reducing the size of the magazine clips down to ten. You may recall that in one instance, he had used two clips with thirty rounds, fifteen rounds in each clip. We were particularly interested in that. Those of us who were able to do so continued our gun control activity. Unfortunately, we were not successful.⁴⁴

In one of the meetings that we had with the New York State Senate, Mrs. Caroline McCarthy, who had lost her husband on the train, and her son, Kevin, who was the most seriously injured, went up with me and two others to Albany in an effort to ask the Senate to listen. We said, "You have combined the death penalty bill with the assault weapons bill. Why don't you disjoin them, and vote on each measure separately? Let them stand or fall on their own merits, and we'll be done with that."

I will never forget Mrs. McCarthy sitting at the end of one of the conference tables at that meeting, when the Senate majority leader said, "Oh, we can't do that. That procedurally would not be possible." She said, "Listen, you just take a pair of scissors and cut the bill in half. Vote on the death penalty in the morning and the assault weapons in the afternoon." Oh my goodness, they almost fell off their chairs. That was too simple. And that is a true story. The end of it is that we were not successful.

Toward the end of May, I was driving my son to a friend's home. He said, "Dad, today in class. . ."—he was a high school senior at that time—"we were discussing capital punishment. We never really got to a vote on it, but I know the teacher is going to ask for a raise of hands. I know you're in favor of it. Let me ask you a question." I said, "Go ahead, Ryan." He said, "After the gunman's trial is concluded, and let's assume that he's convicted, and let's assume you had the right, would you take him back on the train, put him down in the aisle, get that gun, and would you execute him?" I said, "Well, hold it, Ryan, now you're asking me, would I do the execution?" He said, "Yes." I said, "That's a little too personal, son."

I dropped him off; I was driving home. I said, "Oh my goodness, would I kill him?," if all the legal provisions were in place, etc., and it were not something illegal, and I could not answer myself.

I started to give thought to this idea of the ultimate, ultimate, ultimate punishment, after what not only I, but others who were more seriously injured, had endured. I started to do some reading

44. Nicholas Goldberg, *Cuomo's Record on Crime: Reality vs. Perception*, *Newsday*, Oct. 18, 1994, at A17.

on it. It came to, number one, a shock, concerning the cost alone. I had had no idea that a life term without any possibility of parole, at \$25,000 times fifty years or whatever, is still cheaper than one execution.⁴⁵ I then started to talk to my now-friends from the train, and we started saying, "Hold it, if this is going to come back into existence, and it's going to be more costly, then the people should know this. The voters should be told that, although there are no verifiable facts or data that can show that it is a deterrent—and we are clearly convinced that if there was a death penalty in New York back on December 7, 1993, it wouldn't have made a difference to Colin Ferguson. Therefore, it is in our judgment punishment only. And if that punishment imposed by the State is more expensive than keeping that individual in jail for the rest of his normal life, where's the question here?"

In our travels, in our meetings, in our appearances, we had come to meet many, many, many other survivors, widowers, mothers, fathers of people who had been murdered. We quickly realized that because of the high profile, or the amount of and the type of publicity that our incident had received, we were certainly in a different category than those people who had suffered the loss of a loved one in an incident that received no publicity. This reminded me of my earlier days as a prosecutor when my bureau chief, who had been in Hogan's office in the homicide bureau for many years, said, "Tom, what you have to understand in New York, at least, is that there are ground ball homicides and there are grand slam homicides. The ground balls are those people who are just your common average Joe; nobody other than their immediate family even knows about it." We are talking about the dedication of resources. He said, "Then, there is the high profile, the grand slam, that gets all the attention of the police department." I do not mean to indicate that a person of low-income or at the poverty level, or who is unknown does not get the dedicated efforts of the police department. But certainly after a period of time, that person's case is put on the back burner because of the continual, continual influx of new cases.

We were certainly not a ground ball, we were a grand slam here. Our group was provided with group therapy by the Railroad and by the County of Nassau. In our discussions with other family members whose loved ones had been victims of homicide, we asked them, "Did you people ever go to therapy? Did you go to

45. Jonathan E. Gradess, *Execution Does Not Pay; Barbarism Aside, the Death Penalty Simply Isn't Cost Efficient*, WASH. POST, Feb. 28, 1988, at C5.

group counseling?" They answered, "No, no group counseling, where would you go for that?" We spoke to our pastor, we spoke to our priest, we spoke to our rabbi, whomever it may have been and asked, "Do you think there would be any benefit to sharing with other families this similar type of feeling, of experience?" They said, "Oh, absolutely."

I can say that in ninety percent of the cases, the dedication of resources to the surviving family is not even on either the minds or on the lips of our political leaders. There is such a need out there today for those who may not even have an insurance policy on a loved one who was killed.

Most of us were very fortunate, and certainly the six who died had a financial backstop, either through employment or through their own personal financial ability. With respect to Kevin McCarthy, only through the benevolent approach of his employer has he been able to have his physical therapy, which he goes to one day a week—and he has been doing it for the last year, at a cost of \$6,000 a week. If it were not for his employer, he would only be permitted \$1,200 a week worth of physical therapy.

Let's look at this issue as what is best for society. Are we going to spend enormous amounts of money on an issue where, yes, you may vent the passion, you may vent the anger, and twelve years, ten years from now, some of us may remember the name of the murderer who faces execution? I doubt that we will. But why do that when we can instead punish effectively, ensure that that individual never sees a street corner again and never is released for his natural life, and it is cheaper to do it that way? We can then dedicate our savings to the people who need it most: the children who may have lost a father. How are they going to get on in this world if their family is from modest or from low-income strata? Let's look at it reasonably and intelligently and we can with one stone kill two birds. Thank you very much.

Ronald J. Tabak:

Thank you very much, Tom. I think your story would be well worth making into a documentary, which is something for which our next speaker has won an Academy Award for directing.

Ironically, the entertainment community's major impact on the New York election last year was Howard Stern's using cases like the Long Island Railroad shootings to urge people to vote for

George Pataki. I have read that Howard Stern's audience, which is not especially ideological, was very influenced by those urgings.⁴⁶

But there are other members of our entertainment community who take a different view. One of them I had the privilege to meet for the first time the other night.

Lee Grant began her performing career as a child, performing with the Metropolitan Opera. She went on to the stage and won a Critic's Circle Award for "The Detective Story" and an Obie Award for "The Maids." She next appeared in films. She won the Cannes Film Festival Best Actress Award for "The Detective Story." She has appeared in numerous other films, including "Shampoo," for which she won the Academy Award. She has appeared in many television programs. I remember best the night that her series "Fay" was cancelled, when she appeared with Johnny Carson and talked about the "mad programmer" at NBC who had had the wit to cancel her series just as she was about to appear on NBC's "Tonight Show" to promote it. She has also won Emmy Awards, including awards for her appearances in "Peyton Place" and "Neon Ceiling." She has proceeded to become an eminent director, directing, among other things, the documentary "When Women Kill," about battered women who have killed their husbands.⁴⁷

Interestingly, one of the speakers who (because of a family medical problem) was not able to come today, Stephen Bright, spoke at Columbia Law School this past Monday about the fact that Alabama's death row includes two battered women who ultimately had something to do with the deaths of the men who had been battering them for years.⁴⁸ One of them, Judy Haney, I know about quite well.⁴⁹ She had two lawyers at her trial. One of them joined her in jail in the middle of the trial because he had become drunk. He was brought to jail to dry out overnight. He and Judy were then brought into court to continue the trial. In fairness, it

46. Howard Kurtz, *Talk Radio Hosts, Waking Up on the Right Side of the Bed*, WASH. POST, Nov. 10, 1994, at D4.

47. Shauna Snow, *Lee Grant at Mid-Life: A New Career as Director*, L.A. TIMES, Nov. 11, 1989, at 1F.

48. There are now as many as four battered women on death row in Alabama. Stephen B. Bright, *The Death of Fairness? Counsel Competency & Due Process in Death Penalty Cases*, 31 Hous. L. REV. 1105, 1131-32 (1994) [hereinafter *The Death of Fairness?*]; see Mike Clary, *Rise in Number of Women Condemned to Die Prompts a Study of Sentencing*, L.A. TIMES, July 2, 1992, A5.

49. *Haney v. State*, 603 So.2d 368, 377-78 (Ala. Crim. App. 1991), *aff'd*, 603 So.2d 412 (Ala. 1992); Stephanie Saul, *When Death is the Penalty, Attorneys for Poor Defendants Often Lack Experience and Skill*, NEWSDAY, Nov. 25, 1991, at 8.

must be said that she also had another lawyer. This lawyer subsequently has been suspended from the practice of law because he missed the statute of limitations in some unemployment insurance cases. Judy Haney's judge, who heard no testimony about the battered defense syndrome, sentenced her to death. She remains on death row in Alabama, because her lawyers have not been held to have been ineffective.⁵⁰

Ms. Grant's other directoral accomplishments include winning the Director's Guild Award for the movie "Nobody's Child" starring Marlo Thomas and winning the Academy Award for directing "Down and Out in America," a study of poverty in this country. She has won more awards than I could mention.

What I most admire about Lee Grant is that she has always been willing to speak up for principle, whether it be against blacklists or whether it be against, for instance, Ernest van den Haag the other night, when he was arguing that the death penalty is moral. So it is with great pleasure that I introduce to you Lee Grant.

Lee Grant:

I was so taken by Tom's life-altering experience that I really feel foolish coming up here.

Ten years ago, I was asked to do a documentary for HBO about women on death row. That was a time when there was a moratorium on the death penalty and there was none in New York State, so we called our film "When Women Kill." We explored that phenomenon. Most of the women I interviewed were in battering relationships, and ten years ago this was not a permissible defense.⁵¹ If there had been a death penalty, women who were trapped in a violent relationship could have been put to death for defending their lives. The statistics this year demonstrate that 2,000 women a year are killed by their batterers.⁵²

In addition, how many men on death row have been found to be innocent by accident? Consider, for example, "The Thin Blue Line," a documentary forcing the Texas system to release an inno-

50. *The Death of Fairness?*, *supra* note 48, at 1131-32.

51. Carolyn Pesce, *Ohio's Battered Women Inmates Hope for Freedom to Start Over*, USA TODAY, Oct. 4, 1990, at 1A.

52. *The Silent Crime*, TIME, Sept. 5, 1983, at 23; see Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985); Dawn Brazell, *Until It Hurts[—]Violence Against Women is a Dirty Little Secret, But Some Victims are Breaking the Silence and Reclaiming Their Lives*, POST & COURIER ED., Feb. 6, 1995, at A141 (estimating that 3 or 4 women are killed daily as a result of domestic violence).

cent man, and other cases in which lawyers eventually uncover the guilty parties or journalists accidentally come across new evidence.

There is violence in the home, violence on the streets and guns and drugs—the job of no choice of the disenfranchised poor, white, black, Latino, for whom there is no decent pay if they are unskilled entrants in the workplace. Corporation after corporation gives blue collar jobs to workers in Mexico, in Latin America, in Taiwan, etc.⁵³ Hopelessness is filling our prisons and creating a new, burgeoning, powerful industry: the prison industry. More money is being devoted to prisons in most states than to education.⁵⁴ Consider that most of those put to death are from five southern states⁵⁵ with a history in which taking the law into one's own hands and the lynching of black men were commonplace. The next step, death as entertainment, is a possibility that we cannot avoid discussing in these times. The news and news-as-entertainment programs serve up death every evening. There is a callousness to horror that has replaced shock and vulnerability. We are one of the few countries left in the world which kills legally. We need to examine calmly the causes of violence, not join it and further it.

Ronald J. Tabak:

Thank you very much. Our last two speakers, other than me—I am going to tell you what I hope one of the speakers who could not come would have said—are people who have experience with how the death penalty actually works where it is actually carried out. As Ms. Grant has just spoken about the kinds of people who wind up on death row, I will introduce next Cessie Alfonso, whom I have met at training programs concerning how to represent death row inmates effectively.

Ms. Alfonso is an MSW Forensic Social Worker who, for the last ten years, has helped defense attorneys in representing capital clients. She graduated from the Rutgers School of Social Work. She has written about conducting mitigation investigation. With the help of her associates she has conducted over 250 mitigation inves-

53. See Peter Truell & Bob Davis, *Administration Releases Text of Trade Accord: Debate in Congress Focuses on Election-Year Effect of North American Plan*, WALL ST. J., Sept. 9, 1992, at A2 (Michigan Senator Donald Riegle said the proposed NAFTA agreement may lead to "a tremendous acceleration of jobs leaving the U.S. and going to Mexico.").

54. David C. Anderson, *America's Best Buildings*, N.Y. TIMES, Feb. 20, 1994, § 4, at 38.

55. See WILLIAM J. BOWERS, *LEGAL HOMOCIDE: DEATH AS PUNISHMENT IN AMERICA 1864-1982* (1984).

tigations. She has testified as an expert social worker in over 50 cases in several states, including New Jersey, Florida and Pennsylvania.

She knows what is required to investigate these cases properly, but she also knows how infrequently what is required is actually done. She is prepared to do what is required, and she managed to get here today from New Jersey despite the snow, and we welcome her here.

Cessie Alfonso:

It is a pleasure to be here.

Let me begin by saying, Lee, that as a battered woman expert who has testified on behalf of women who have killed, my experience clearly shows that if we had a death penalty here, there surely would be many, many women who would be on death row for doing what they had to do to save themselves and their children.

I want to share with you what my experience has taught me in terms of conducting mitigation investigations. In order to try a death penalty case, not only do you, as lawyers, have to know the law. You also have to have the capacity to deal with, and identify with, people's misery. If you cannot do it, you must find the people who have the skills, the capacity, and the compassion to engage people in sharing what is, at best, very painful information and, at worst, information that people want to forget.

This requires that lawyers do several things. First, they must transcend their own inherent sense that lawyers can do it all. You must change that perspective because although you may know the law, putting together a penalty phase investigation and communicating it to a jury requires art and skill.

What are some of the reasons that attorneys, in particular, do not transcend that, do not use the art and skill that is required to provide an adequate defense? There are several reasons that I have found over the last ten years. One of them is an arrogance, a belief that "I can do it all." The end result is that significant information is not presented to the jury—information that would help the jurors understand why this human being, in a moment in time, lost his or her humanity.

Another reason is fear and denial. An attorney feels, "I'm not going to lose this case. I'm a lawyer. It's a winnable case." We have known many lawyers that say, "Oh, don't worry about it; we'll do it; no problem." It is not uncommon for me to get calls from an attorney who is starting jury selection and has not even begun to

conduct a penalty phase investigation. These are not southern state attorneys.

Another reason is the attitude, "I've been an attorney for years; I've tried cases; I've prepared witnesses; what's the big deal? I'll go talk to the mother, I'll talk to the father, I'll get this information, I'll put the witnesses on the stand, it's something I can do." Unfortunately, it is more complicated than that. Doing this properly involves more than just putting a witness on the stand. It requires the strategic determination of the best way to present information in a manner that's persuasive and moves people to give someone life instead of death.

In over 200 cases in the last ten years, most of the juries, when presented with mitigation information, have come back and sentenced the person to life. Why do they do that? They do it for several reasons. One is that information is presented to them in a persuasive manner. How do you persuade people who have just convicted someone of committing a crime to come back and give the person life imprisonment? You do it by being extremely thorough in your investigation. The average case that we do requires a minimum of 200 hours of mitigation investigation. A third of those hours are devoted to finding documents—birth certificates, death certificates, military records, drivers' licenses, employment records, school records—anything that helps us understand why this human being could have the capacity to commit this crime.⁵⁶

What is mitigation? People say that if you are going to try a death penalty case, you have to present mitigation information in a persuasive manner.⁵⁷ Well, what is it? I define it as those emotional, situational, cognitive, physiological developmental factors that either individually or in combination significantly contribute to an individual's ability to kill someone else. In order to communicate to a jury whatever those things are, you need to find them out, you need to know what the emotional components are, what

56. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841 n.45, 1858-59, (1994)[hereinafter *Counsel for the Poor*]; see also Nick Davies, *Portrait: A Hope in Hell*, GUARDIAN, Dec. 10, 1993, at 49; Pamela Manson, *Matter of Life or Death: Capital Punishment Costly; Despite Public Perception, It's Cheaper to Keep Killers in Prison*, AM. REPUB., Aug. 23, 1993, at A1.

57. See *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982) (holding that a capital defendant must be allowed to present all relevant mitigating evidence before sentencing); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion) (holding that "a death penalty statute must not preclude consideration of relevant mitigating factors"); *Counsel for the Poor*, *supra* note 56, at 1841 n.45, 1858-59.

the physical components are, and what the cognitive components are, including intelligence testing.

You also have to do generational analysis. When we conduct our investigations, we go back three generations. Not only do we have to find documentation on the client's parents but also on grandparents and great-grandparents. We find such things as a schizophrenic grandfather or a father who sexually violated his daughter within view of her brother (our client). You must uncover the horror stories, the cruelty and the brutality that people have been subjected to.

This work also requires the capacity to listen to and live with an enormous amount of horror. It really takes a toll on you. One recent case really took a toll on me. Our client's mother would not share information with me. I knew there was something very traumatic going on in her family and that she had been extremely brutal with the defendant. It turned out that she had become pregnant with another child, and that her mother did not approve of that. When she gave birth at home, her mother took the newborn infant with its placenta and literally threw it in the pigpen. This woman was only fifteen years old when this happened. This was a secret that she had tried to forget. I cried with her. I then had to get this woman to come to court and talk about this. So not only are you dealing with a horrendous crime for which your client has been convicted; you also have to walk into people's lives and get them to share nightmarish and horrific information with you, and then try to get them to have the courage to come into court and communicate that to the jury. It is extremely difficult, painful and trying work.

This work also requires that you answer to the jury what I call the "So what?" phenomenon. If you go in and say, "He committed this crime because he was poor," jurors may say to themselves, "So what? I was poor." If you say, "He grew up in a home where there was alcoholism," many would react by thinking, "I grew up in a house where my father was an alcoholic and beat my mother, but I did not go out and kill anybody." You need to be able to answer such "So what?" questions, and that requires enormous amounts of time, skill and patience. But if you do it well, you can communicate to a jury very effectively that the most appropriate way to respond to this person's loss of humanity is to sentence him to life imprisonment, not death.

This can be done in the most difficult cases. Two weeks ago in New Jersey, we had a case involving an African-American male

who went into a home to commit a robbery, took a hammer and killed an eight-year-old boy and his aunt. The defense attorney had to defend this man, who refused to cooperate with him. The attorney was a middle-aged white man, whom the client accused of being a racist. The client punched the defense attorney in the throat. To this day, the lawyer can not speak very well. But the judge refused to let him off the case. The client then proceeded to punch the prosecutor in front of the jury. The client would not give us permission to get any kind of information at all. He would not sign a release of information, and the only number we had was for his girlfriend—who was a witness for the prosecution.

What was required was that we engage the girlfriend. It took us a month to do that. She finally found an old phone book, and we saw in it telephone numbers of family members. We flew down to North Carolina and walked into our client's mother's house. His mother was obese and extremely depressed. She had been severely beaten and had had twelve children in addition to our client. Four of our client's siblings had been in prison. In order to engage the client's mother, I provided some counseling for her and tried to find out if there was a counseling center in North Carolina for her. It turned out that our client's father was a very brutal man who had beaten our client's mother with a chair and with a butt of a gun. He would get so intoxicated at times that he did not know where he was defecating and would do it in the kids's room. He sexually violated all of them. We also found two of our client's siblings, one in New Orleans and the other in Atlanta, Georgia.

These two siblings came up to New Jersey and told the jury what our client and everyone else in his household had been subjected to. The jury sentenced him to life imprisonment. One reason for this favorable outcome is that the attorney knew when he did not know something and knew when to take advice. Although the standard procedure in most cases is to have the client in court during all of the testimony, because the jury may otherwise find it impossible to be sympathetic to him, we recommended that if his family members testified, the client should not be present, as he could not tolerate being reminded that his father had sodomized him. The attorney took our advice, and the client was not present during his family's testimony.

These trials cost so much money because, among other things, you have to find people. I am leaving Monday morning to go to Cuba to find people on three death penalty cases. These mitigation investigations are not cheap. They are very expensive and very

time-consuming.⁵⁸ It is not like you can call Mrs. Jones and ask her to tell you certain information. When you get on the witness stand, you have got to be able to say not only that you spoke to Mrs. Jones, but also that you saw her in her home and got the client's birth records.

You have got a job on your hands. It is not easy. But my experience is that when you put twelve people in a room and you tell them what really caused this person to lose his humanity, the twelve people tend to come back and sentence him to life. Thank you.

Ronald J. Tabak:

Thank you very much, Cessie.

It is important for you to know that Governor Pataki believes very strongly that the State should not pay for an indigent capital defendant to get the kind of representation that Cessie Alfonso has just described.⁵⁹ In the negotiations that are going on now about the death penalty bill, Governor Pataki's aides have attacked Speaker Silver, who favors the death penalty, for attempting to provide for a statewide capital defender office which would ensure the kind of defense about which you have just heard—and which is responsible for New Jersey's very low percentage of capital defendants who get the death penalty.⁶⁰ Governor Pataki, in seeking to change the death penalty bill which in the campaign he had promised to sign into law, proposed to decrease the amount which defense counsel would be paid for doing these cases.⁶¹

Our next speaker has the same name as the first person executed in the United States.⁶² He is a graduate of Antioch Law School. I was reminded earlier this week by Stephen Bright that when I handled my first capital case, on a *pro bono* basis, our next speaker,

58. See also *Counsel for the Poor*, *supra* note 56, at 1847-48; Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 349-53 (1991).

59. Michael Slackman, *Death Bill Stirs Critics; Prosecutors, Interest Groups Voice Concern*, NEWSDAY, Feb. 17, 1995, at A23.

60. See, e.g., James Dao, *Delay in Albany on Death Penalty*, N.Y. TIMES, Feb. 15, 1995, at A1; Gene Mustain, *Deadly Delay*, DAILY NEWS, Mar. 5, 1995, at 16 ("In 61 of the last 70 [capital] cases, New Jersey juries have opted instead for sentences of life in prison with no chance of parole for the first thirty years.").

61. See generally Michele Parente, *A Capital Case; Death Penalty Wrangling: Trading Blame Over Holdup*, N.Y. NEWSDAY, Feb. 26, 1995, at A3.

62. Francis X. Clines, *1,361 Executed Here, and Fear Restraints Count*, N.Y. TIMES, Mar. 19, 1995, at § 1, 37.

along with Steve and others in Georgia, helped to explain to me what a gun was.

At that time, George Kendall had recently moved to Georgia from Washington and was the head of the ACLU's death penalty work in Georgia. Several years later, he moved to New York to join the NAACP Legal Defense Fund's capital punishment project, which at this point unfortunately has only two lawyers.

He exemplifies the best in our legal tradition, and I'm proud to call him my friend. Here is George Kendall.

George H. Kendall:

Thank you very much. It is nice to be on a panel like this. There have been so many wonderful, informative people that I can cut my remarks down to just a few minutes.

Ron asked me to speak today as a substitute for my colleague Steve Hawkins. As happens in this business, Steve, suddenly and without warning, received terrible news. For many years, Steve has represented a young black man on Alabama's death row named Horsley. Mr. Horsley was tried and sentenced to death by an all-white jury,⁶³ with the services of the kind of lawyer you have heard about from prior speakers. Mr. Horsley just lost his appeal in the Eleventh Circuit Court of Appeals, in a bitter 2-1 decision.⁶⁴ Steve regrets he cannot be here today. He is in Alabama seeing his client and his distraught family.

I would like to put a national perspective on what New York is likely going to face very soon if we do not see the kind of courage from our leaders in Albany that we have seen today from Mr. McDermott. If our leaders in Albany had half the courage and insight that Mr. McDermott has, we would not be meeting today and having to discuss this terrible dilemma.

Last week, I had the pleasure to be in Wisconsin, which also, like New York, has long been an abolitionist state. Indeed, it has been an abolitionist state since 1853. The last person who was executed in that state, in 1851, was not executed pursuant to a judicial order; he was lynched. That lynching led that state to abolish the death penalty two years later, and it has not seen fit to bring it back. Now, with new leadership in its State Senate and House, Wisconsin is within just a handful of votes of reinstituting the death penalty.

63. *Horsley v. Alabama*, 45 F.3d 1486 (11th Cir. 1995).

64. *Horsley*, 45 F.3d at 1486.

Last Friday, there was a very important press conference, at which four elected state prosecutors appeared. One of them was the prosecutor from Milwaukee, who had tried the Jeffrey Dahmer case.⁶⁵ Without any equivocation whatsoever, he stood before the hot lights and begged the leadership in Wisconsin not to embrace the death penalty. He has been in law enforcement for more than twenty-five years and has had experiences not merely in Wisconsin, but all over the country. He told the media that he felt he had a sense regarding what is good about the criminal justice system in Wisconsin and what is wrong with the criminal justice system in other states. His message was that we in Wisconsin should try never to forget the humanity of the people who are unfortunate, who have to come into the criminal justice system—whether they are victims of the crime, whether they are jurors who have to deal with what often are impossible circumstances, whether they are witnesses or even whether they are criminal defendants. His firm belief is that if Wisconsin embraces the death penalty, it will lose something very basic to the fairness and justice of its system. It is too bad there are not more people like that in positions of leadership in Wisconsin. We certainly need their voices more than ever.

The organization for which I work, the NAACP Legal Defense Fund, has been litigating capital cases for more than 50 years. Before that time, the NAACP was formed to deal with the problem of lynching. In America between the years of 1880 and 1930, hundreds and hundreds of African-American men were lynched all over the South, and even in other parts of the country.⁶⁶ Those days obviously have passed, but often what we see passing for justice is not very different. In fact, many people refer to today's executions as legal lynchings.

My first capital client was David Peek, a young African-American man from Georgia.⁶⁷ His trial began at 9:00 a.m. His jury was selected by 11:00 a.m. The guilt/innocence phase was over by 4:30 p.m. The jury went out to deliberate after dinner. The jury was hung 11-1 at midnight. When that one juror was said to be feeling a bit dizzy, the juror was discharged without the judge or counsel ever seeing that juror. The first alternate was then sent to the jury

65. *15 Life Terms and No Parole for Dahmer*, N.Y. TIMES, Feb. 18, 1992, at A14.

66. Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 6 (1993); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, at 6 (1980).

67. *Peek v. Kemp*, 784 F.2d 1479, 1482, 1504 (11th Cir.) (*en banc*) (Johnson, J. dissenting), *cert. denied*, 479 U.S. 939 (1986).

room. Three minutes later, David was convicted of four capital offenses. At 1:30 a.m., the penalty phase began, and by 2:30 a.m., he was under a death sentence. What was remarkable about David's case is not that that happened—there were many capital trials at that time that were one-or two-day affairs—but that David Peek never received any relief due to ineffective assistance of counsel. His lawyer had tried one case before he got into that case. No state court vacated David Peek's conviction or death sentence, nor did any federal court.

However, ten years after his charade trial, it was discovered that state mental health officials had known all along that the highest score that David Peek had ever achieved on an I.Q. test was 59. After wearisome wheeling and dealing, finally the State of Georgia agreed that David Peek should not receive the ultimate sentence but could instead spend the rest of his life in jail.⁶⁸

What drives the death penalty in Georgia and Alabama and California, and will drive it here, is politics. Prosecutors will have unfettered, unreviewable discretion to choose which cases to seek the death penalty in, and which not. It is no surprise that they will seek the death penalty in those cases where, in their view, they are going to advance their careers. There are prosecutors in all the darkest corners of the death states who never seek the death penalty. Probably half the people on death row in Alabama have been placed there by three or four prosecutors.⁶⁹ The same is true in Georgia.⁷⁰ It is politics that really makes this thing happen.

In New York, it is going to work the same way unless some very stringent protections are put into the death penalty bill. What are they? Obviously, unless someone has a competent defense team, he or she is going to do no better than what we see in other parts of the country. We have been trying at the NAACP Legal Defense Fund to monitor the discussions that are going on between Governor Pataki's team and the Assembly team. I regret that I cannot offer any assurance that there will be any adequate provision for counsel to indigents facing capital sentences in this state. We know about the cuts to the Legal Aid Society here. It would take a sizable allocation to create a credible, competent independent capital defender office. But without such an office, we are going to see untrained lawyers doing these cases, particularly upstate. It would

68. *Georgia v. Peek*, No. 9793 (Ga. Super. Ct., Green County filed Jan. 24, 1992).

69. See generally *The Death of Fairness?*, *supra* note 48, at 1130-31 (elected judges preside over capital cases tried by their former proteges from the prosecutor's office).

70. *Counsel for the Poor*, *supra* note 56, at 1844-45.

be a disaster. Let us hope, however, that the course turns and that there is adequate provision for a proper defense team.⁷¹

What else is needed? In the last fifteen years, over 50 persons who have been on death row have been determined to be innocent. Luckily for them, they have walked off death row before they were executed. In more than half of those cases, someone on the government team knew that the person was innocent. There were documents in the police file or the prosecutor's file documenting it.

I just spent a day in Albany last week with a man from New York who spent five years in prison for a crime he did not commit. The first of the two eyewitnesses on the scene had identified the two assailants in the crime as being two white males. The man I met last week and his brother, both of whom were African-Americans, were nevertheless prosecuted, convicted of murder and incarcerated. The exculpatory police reports were not disclosed for several years, until the case was on appeal. We have seen that over and over and over again. If Governor Pataki is serious about having a death penalty that avoids this kind of miscarriage, he would insist upon a very strict discovery provision that would require the police and the prosecution to turn over all of their non-work product materials long before trial, and would provide a real sanction for those police officers and prosecutors who fail to heed that very important duty.⁷² Despite the fact that there have been many cases of gross misconduct by state officials,⁷³ we are not aware at the NAACP Legal Defense Fund of any police officer or any prosecu-

71. *Editor's Note: The enacted death penalty law does not make adequate provision for a proper defense team, although the law does provide for the formation of a capital defender office. See Section 29 of the statute, adding a new section 35-b to the Judiciary Law. The statute does not provide any funding for that office, other than start-up costs. Moreover, under paragraph 2 of Judiciary Law section 35-b, the appointment of counsel will be made by the trial judge, not the capital defender office. The office will be limited to nominating four teams consisting of only two lawyers each, with one such team having to be from the local judicial department. Only two trial lawyers, at most two appeal lawyers, and only one post-conviction lawyer can be appointed and funded pursuant to new section 35-b of the Judiciary Law—far fewer lawyers than have been appointed in New York's two federal death penalty prosecutions in recent years. (In some situations, the capital defender office itself, or local legal aid or public defender offices, may undertake the defense.) It is possible that under pre-existing New York law, additional lawyers might be appointed for such proceedings, but there is no assurance that that will occur or that the capital defender office will have any role in the selection of any such additional attorneys.*

72. *Editor's note: There is nothing in the new legislation requiring this type of exacting discovery.*

73. See MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* 17 (N.E. Univ. Press 1992).

tor who has lost one hour's worth of pay for "holding the bag" on evidence that points to innocence.

What else do we need to worry about? Racial discrimination. It has always been tied up intimately with the administration of the death penalty in this country—not simply in the South, but all over. We are a very young country. While most of us in this room went to law school at a time when there was a new-found commitment to the principle of equal protection under the law, for much of our history that has not been the case. For many years in this country, laws required different punishments based on the race of the victim. For many years in this country, if a white killed a black, the punishment was a fine,⁷⁴ but if a black killed a white, the punishment was mandatory death.⁷⁵ In many parts of this country, those practices have not completely died off.⁷⁶ White victims' lives are often treated as having greater value than when victims are non-white.

What do we need to do about this? Unless we do something effective, there are going to be mixed race capital cases in New York, particularly upstate, that will be tried before all-white juries. That would be a travesty. Juries in capital cases have to make an enormously difficult, reasoned moral decision between death and life imprisonment. They have to look at an enormous number of factors. An all-white jury should not be making those judgments when those kinds of stakes are on the table.

We see that all over the country, despite *Batson's*⁷⁷ having been on the books for almost ten years, prosecutors are continuing to use an enormous number of peremptory strikes in jury selection, particularly in capital cases, to achieve, if not all-white juries, juries with only *de minimus*, token minority participation.⁷⁸ If the trial courts are not willing to police *Batson*,⁷⁹ the New York Court of Appeals must police the capital cases, or else we are going to see

74. William W. Fisher, III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051 (1993).

75. *Id.*

76. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988); Derrick Bell & Linda Singer, *Making a Record*, 26 CONN. L. REV. 265, 280 (1993).

77. *Batson v. Kentucky*, 476 U.S. 79 (1986).

78. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?* 92 COLUM. L. REV. 725, 730 (1992); Douglas L. Covery, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 96, 97 (1990).

79. *Batson*, 476 U.S. 79.

juries that do not reflect the community deciding many of these cases.

Lastly with respect to racial discrimination, the Supreme Court of the United States in 1987 essentially said that unless one caught the prosecutor saying to somebody that he was deliberately making decisions on that basis, even persuasive statistical evidence showing such discrimination would not be sufficient to establish a *prima facie* case of racial discrimination.⁸⁰ If Governor Pataki is at all serious about dealing with this very serious problem, he would make sure that there is a strong Racial Justice Act in the death penalty bill.⁸¹

I hope the people in this room, who are concerned enough about this issue to trudge out in the snow, will, if we do become a death state in the near future, get involved in this issue in some way. In some of the worst places, slow progress has been made concerning how the death penalty is used, and who gets it, because determined, committed people like yourselves got in this battle and fought.

I had the duty to represent a young Georgia man who was mentally retarded, in a successor habeas proceeding.⁸² His name was Jerome Bowden. Despite many good efforts from many people, he was executed in 1986. His was about the eighth execution in Georgia in the 1980s. It was the first execution that really bothered peo-

80. *McCleskey*, 481 U.S. at 292.

81. *Editor's Note: The enacted New York death penalty law does not contain a Racial Justice Act. It does, however, contain a provision, section 27, which amends Section 470.30 of the Criminal Procedure Law by adding subdivision 3, which requires the Court of Appeals, inter alia, to determine "(a) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor including whether the imposition of the verdict or sentence was based upon the race of the defendant or a victim of the crime . . .;" and "(b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. In conducting such review the court, upon request of the defendant, in addition to any other determination, shall review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted."*

These provisions, if properly enforced, could go a substantial way towards minimizing the impact of racial discrimination in capital cases. However, establishing a statistical pattern of discrimination requires a substantial volume of cases, and there may for a time be an insufficient volume of cases. Moreover, if, as discussed in the text above, there is not vigilant protection against particular manifestations of racial discrimination, such as prosecutors' overuse of peremptory challenges to exclude jurors of color, the revised Section 470.30 of the Criminal Procedure Law would be of only limited impact.

82. *Bowden v. Francis*, 733 F.2d 740 (11th Cir. 1984), vacated & remanded, 470 U.S. 1079 (1985).

ple, because the press reported that the Board of Pardons and Parole was not sure whether or not it should carry out the order of the court, because it was concerned that Bowden might not understand what was going to happen to him. So, they sent a psychologist down. The newspapers reported that Jerome had shown up to see the psychologist and had worked as hard as he could, and because he scored 65 on the I.Q. test, the Board of Pardons and Parole was persuaded that he did not suffer from mental retardation, and that it could go forward with the execution.⁸³ Many people in Georgia like yourselves took action after Jerome's execution. Remarkably, two years later, Georgia became the first state in the country to pass a bill that bars the execution of the mentally retarded.⁸⁴

One thing I never thought we would be fooling around with in New York is debating the question of whether or not New York, if it adopts the death penalty, should allow persons with mental retardation to be executed. There is no ban in the Volker-Graber bill⁸⁵ (the bill vetoed for so many years by Governors Carey and Cuomo) on executing people with mental retardation, and there is no guarantee that there is going to be a ban on executing people with mental retardation in the bill being negotiated now.⁸⁶

83. *Spare Mentally Retarded Convicts*, ATLANTA CONST., July 7, 1987, at 8-A; see also Marianne Lavelle, *Birthplace of Modern U.S. Death Penalty*, NAT'L L.J., June 11, 1990, at 34; Jeffrey S. Trachtman, *Why Execute the Retarded?*, WASH. POST, Nov. 17, 1988, at A25.

84. OCGA § 17-7-131(c)(3), (j); *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989); see also Trachtman, *supra* note 83.

85. S. 6350, 215th Gen. Ass., 2d Sess. (1994).

86. *Editor's Note: Ultimately, the Legislature included a provision under which under most circumstances, if the trial judge determines that the defendant is mentally retarded, the defendant cannot be executed. See Section 20 of the statute, adding § 400.27, subdivision 12 to the Criminal Procedure Law. However, subparagraph (d) creates an exception that is unique in statutes exempting people with retardation from execution. Under this exception, any mentally retarded person who kills a prison guard while "confined or under custody in a state correctional facility or local correctional institution" for any crime whatsoever, even for an alleged crime for which the prisoner is never convicted, may be executed. Moreover, if the jury, in the course of imposing the death sentence, concludes that the defendant is mentally retarded (as it can do under § 400.27, subdivision 9(b)), that does not require—and may not even authorize—a trial judge who has previously reached a different conclusion to now agree that the defendant is mentally retarded. Accordingly, a defendant whom the jury, but not the judge, concludes is mentally retarded may be executed under this statute. Furthermore, because only two trial lawyers can be appointed pursuant to this law, see *supra* note 70, there is a substantial danger that defense counsel will have inadequate training, time and resources to realize, and prove, that the defendant is mentally retarded, thereby leading even more mentally retarded defendants to be executed.*

Finally, the state judiciary has to make a particular commitment to seeing that everyone in these cases lives up to their constitutional and ethical obligations. In Washington, there is a new crime bill, believe it or not.⁸⁷ The ink on the old one⁸⁸ is hardly dry. One provision in that crime bill calls for what Jesse Helms and Newt Gingrich are calling "habeas corpus reform."⁸⁹ "Habeas corpus reform" according to Jesse Helms and Newt Gingrich is really habeas corpus repeal.

If the habeas bill that is going to be filed in the Senate⁹⁰ passes—and if I were a betting person, I would wager money that it will—the effect of that law will be to virtually handcuff and blindfold the federal judiciary, preventing it from granting any remedy whatsoever even when it is faced with egregious, shocking, harmful violations of the Bill of Rights in capital cases. Our country has never had real enforcement of the Bill of Rights without the federal judiciary standing as a backstop to the state judiciaries. We all know the stories, prior to the Warren Court revolution, of state court "enforcement" of the Bill of Rights.⁹¹ I do not have any confidence that many state judges in Alabama and other states are going to apply the Constitution in the same way that they do now, if no federal judge is looking over their shoulders. In these cases, where politics can have a very significant effect on all of the actors, it will be an extreme challenge to the state courts to apply the Constitution fairly if Newt Gingrich and Jesse Helms get their way in Washington.

Thank you so much for coming. Let's get into this battle and not quit.

Ronald J. Tabak:

Before I open things up for questions, I am going to say a little bit about the two speakers who were not able to come. Doris Hoffman is the president of the Women's Bar Association of the State of New York. I had the pleasure last week of being the only male person present at the meeting of the Women's Bar Association of

87. H.R. 729, 104th Cong., Reg. Sess. (1995).

88. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. 103-354, 108 Stat. 1796 (codified as amended in scattered sections of 42 U.S.C.).

89. H.R. 729, 104th Cong., Reg. Sess., Title I (1995).

90. *Editor's note: The bill to which Mr. Kendall referred was filed on March 24, 1995, by Senators Specter (R.-Pa.) and Hatch (R.-Utah). The Federal Habeas Corpus Reform Act, S. 623, 104th Cong., 1st Sess. (1995).*

91. *Jenkins v. State*, 161 P.2d 90 (Okla. Crim. App. 1945); Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 9 (1993).

the State of New York when it reaffirmed its opposition to the death penalty.

Roberto Ramirez is the Bronx Democratic Leader. He is an assemblyman from the Bronx. I believe that he would have given the following analysis on the question, Are Executions in New York Inevitable? They are inevitable unless people like those who are in this room today do something about it now.

Enactment of the death penalty in New York is inevitable if we do not do anything, because there are basically four groups of Democrats in the Assembly. The majority of Democrats in the Assembly, but not a majority of the Assembly, are opposed to the death penalty and vote against it.⁹² There is a second group consisting of Assembly members who are privately opposed to the death penalty but who have voted for it because they knew that Governor Cuomo would veto it. So, they could sleep well at night, but they always told us they would not really vote for it if it were really going to pass. There is a third group of Assembly members who tell us that they sort of favor the death penalty but recognize that the bill for which they have been voting for many years, often without reading it, is unfair—for many of reasons we have been describing. They have always said that if it were really going to pass, they would make sure it was fair. However, this group's members, while supporting Speaker Silver (who is one of this group) in his advocacy of fairness principles, have not yet been willing to say that if the fairness principles are not all included in the legislation, they will vote against the bill. The final group of Assembly Democrats, probably the smallest group, consists of people who would like the bill to be as inclusive as possible and who do not care about the fairness principles. But this group's members are not numerous enough to prevent passage of a bill that would incorporate the fairness principles espoused by New Yorkers for Fairness in Capital Punishment (which includes prominent Republicans such as former Governor Malcolm Wilson) and the New York State Bar Association.⁹³

If the people in this room and others who care about this issue talk to people who are in the second or third groups I have de-

92. James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1.

93. Statement of Principles, New Yorkers for Fairness in Capital Punishment, December 1994 (circulated by Harold R. Tyler, Jr. and Norman Redlich); State Bar Ad Hoc Committee's Report on Proposals for a Death Penalty Statute, adopted unanimously as the official position of the New York State Bar Association by its executive committee in January 1995.

scribed, and urge them to say that inclusion of all the fairness principles is a precondition to their support of a death penalty bill, there is some hope of something less indecent happening. But if we do not do anything, then the Governor Pataki approach, which is to make the old bill even less fair, will be adopted.

People who have questions should now go to one of the microphones. Yes.

Jack MacKenzie of the New York Times: You mentioned New Jersey as a place where defense services meet some standards. Is there any state with the death penalty that has something to which New York can aspire, in terms of humanity and civility and adequate counsel?

George H. Kendall: There were a lot of states that, when the death penalty came back in the 1970s, thought that they could provide competent representation via an appointment system,⁹⁴ that trial judges would appoint the most respected or most experienced lawyers in the community to do these cases. The evidence is in now. In every state we know of, that system has been an unmitigated disaster.⁹⁵

The death penalty has become a very, very specialized, technical area of the law. The Supreme Court of the United States alone has issued more than 200 opinions that affect these cases since 1976.⁹⁶ We see now that there are states that do a much better job in providing for talented, dedicated, adequately funded representation. What are they? Colorado is one example. Colorado has a special capital defender unit within its statewide public defense system.⁹⁷ That unit has a number of lawyers and death penalty work is all that they do. Whenever there is a death notice in Colorado, this unit will go to that part of the state and work with the local public defender or lawyers in that community to represent the individual or individuals. It is not surprising, because they are a very good outfit, that there are only a handful of people on Colorado's death

94. See generally Richard Klein, *The Eleventh Amendment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).

95. *Id.* at 364.

96. See, e.g., *Seventeenth Annual Review of Criminal Procedure*, 76 GEO. L.J. 1073 (1988), and cases cited therein. See also *Tyson v. Arizona*, 481 U.S. 137 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982), two of the more recent landmark decisions of the Supreme Court demonstrating how specialized death penalty jurisprudence has become.

97. Ginny McKibben, *Death Penalty Revival[—]Forecast 2 Units Would Duel*, DENVER POST, Apr. 3, 1994, at C1.

row.⁹⁸ They are excellent at what they do. A number of other states have now, with the blessings of the state judiciaries, used the state and federally-funded resource centers, which were originally created to do post-conviction work, to assist private counsel or public defenders at the trial level.

New York, as we speak, does not have a resource center with lawyers who are experienced in this area, nor does it have any specially created trial office. Particularly in the upstate areas of New York, the lawyers in many counties have never tried a homicide case.⁹⁹ If a capital case arises in many of these counties, the same problems are going to present themselves. That is why a number of people have been urging the Governor, and the others who are writing these bills, to avoid the vaudeville stories that other speakers have spoken about today, by making a very serious commitment to the provision of competent, adequately funded defense services.

Ronald J. Tabak: In speaking to members of the group which screens the 18-B homicide panel for the First Department, I have learned that they are scared beyond belief about the possibility that lawyers on that panel may have to handle capital cases. They do not believe that these lawyers are qualified to handle those cases. The Legal Aid Society traditionally has not handled even regular homicide cases. So, these problems are not limited to upstate.

John P. Rudden: I will make more of a comment than a question. My name is John Rudden. I am an attorney practicing in New York City. I spent twenty years in the New York City Police Department and retired as a Captain a number of years ago. Since then, I have defended criminal cases, including homicide cases—no capital cases, of course. I have basically spent my entire adult life dealing, one way or another, with the criminal justice system.

I am totally and completely against the imposition of the death penalty. I fully agree with all of the practical reasons why we should not have a death penalty: that it is unfair, that it costs too much, that innocent people get convicted. But I think Mr. McDermott's words really hit home to me. Fundamentally, it really is a moral issue here. He spoke about the individual anger and rage that he had from being a victim. Victims of crimes all feel that. However, as a society, we cannot bring ourselves to that level. In

98. ROCKY MOUNTAIN NEWS, Feb. 18, 1995, at 6A (noting that Colorado has only three death row inmates).

99. See *supra* note 72 and accompanying text.

the criminal justice system, we bring cases in the name of the People, not in the name of individuals. I think we do that so that we can get away from this individual rage.

Mr. McDermott also mentioned the question that his son had raised: "Would you be the executioner?" I feel that if we, as citizens of the State of New York, vote for the death penalty, or if the Legislature votes for the death penalty, we are all then executioners.

I would like to do whatever I can do to publicize this, to get it out to the public, and make the public start to think about what really is happening with the death penalty and not just take what Cardinal O'Connor spoke of as the "quick fix" approach.¹⁰⁰ I would like to know what we can possibly do to try to change the public perception that we have today.

Ronald J. Tabak: We need to get Cardinal O'Connor's remarks today disseminated widely, because most Catholics in this state, and most other citizens, are probably unaware of the Catholic bishops' position on the death penalty. In Rochester recently, in every parish there was a sermon against the death penalty, and petitions were signed. That would be a very good example to emulate in the New York and Brooklyn dioceses, and in the suburban counties. We need to get other religious leaders to speak out on this.

We need to have any of you who are members of any community group to get the group to have a meeting, or a forum, or a debate on the death penalty. We have people like Eric Freedman and George Kendall who can speak on this issue if we can get out there and if we can get in the media.

One way we can get more publicity is by having people such as Lee Grant come forward and speak. The other night when I walked up to her, she said "Who are you?" Much as I might like to be a household name, I am not. Lee Grant, Susan Sarandon, Tim Robbins and many other people who were at that Creative Coalition debate, are household names. If they come forward and have a press conference, we could then get some publicity. They could also help us raise money. Their participation gives some legitimacy to our position on this issue.

People wondered the day after the election why I was not as down in the dumps as others were about the electoral disaster. It was not because I did not know it was a disaster. I said, "This is also an opportunity." For years, we have been trying to get the

100. See Comments by His Eminence, John Cardinal O'Connor, *infra*, at 564-571.

national press to report about how the death penalty actually works: how it is not a deterrent; how it costs more money; that there are alternatives to it; how it is racist; how the mentally retarded get executed. But the national press has not reported this in any coherent way. Instead, there is typically one *ad hoc* story here, another *ad hoc* story there. If New York State, the media capital of the country, has a real debate about the death penalty and if we have real reporting by all the national media, then even if we go down fighting, the public will learn what is going on, including the consequences of getting rid of habeas corpus and cutting the amount of time that death penalty cases can take.

There are a variety of things that anybody can do. We need to get into the law schools, the colleges and the high schools, and talk about how the death penalty actually operates. Many people tell us that when they do learn about it, they decide to oppose capital punishment. Often they ask, "How come no one ever told us about it before?"

We have to deal with the cynicism of our elected officials who know there are things wrong with the death penalty but vote for it anyway. Why do they do that? Because they think that people who like the other things they vote for will give them a free ride on this issue and will still support them even though they repeatedly vote for the death penalty. That is what many anti-death penalty people did in 1992, in supporting Bill Clinton in a campaign which he interrupted to go to Arkansas to deny clemency to a man who had shot himself in the head and was suffering from such permanent brain damage that he left behind some of his dessert so that he could eat it following his execution.¹⁰¹ We need to let public officials know that we care deeply about this issue and will not forget what they do.

We must also tell them that they are deluding themselves when they think that, as many in Albany will tell you freely, if the death penalty is enacted, no one will ever again accuse them of being soft on crime. That is not true. The soft-on-crime issue is just like the old soft-on-Communism issue. It will be used no matter what the Assembly Democrats vote for. I will give you one example of that: Ann Richards, Exhibit A. Ann Richards did nothing to stop executions in Texas, which had far more executions during her tenure

101. Marshall Frady, *Annals of Law and Politics: Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105; NEWSDAY, Mar. 22, 1992, at 7 (noting that then-Governor Clinton returned to Arkansas to deny clemency to a brain-damaged man).

than any other state.¹⁰² Nevertheless, she was attacked successfully by George W. Bush for not causing even more executions, even faster.¹⁰³ We can give you many other such examples from numerous other states.

You can not out-demagogue demagogues. They will find a way to raise the soft-on-crime issue, no matter what the Legislature enacts. So, the Assembly might as well stop the death penalty before it ever gets started.

Al Rodbell: I would like to make a comment and ask a question. My name is Al Rodbell. I am agnostic on the death penalty issue but I am against the present pending legislation in New York State. I do not have the opportunity to explain why I am agnostic. Herein lies the difficulty in this group and why I fear the present bill may be passed. It may be passed because in the basic approach of the people who oppose the death penalty, the distinction is not made between the pending bill, which would be terrible, and the concept of the death penalty. Phrases are used such as "barbaric activity" and "morally reprehensible." You may all feel this way, but when you use those phrases—although it expresses your anger—you lose the 60 or 70 percent of the people who have reasons to support the death penalty. Those people do exist. They are not given time to voice their reasons here, and you may ignore them, but you ignore them at your peril. Each time you use the phrase "morally reprehensible" or "barbaric," Newt Gingrich gets another voter and Rush Limbaugh gets another supporter. When people are told that they have no morality, they will find someone who will validate their views.

I spent half of the day yesterday reading Mr. Tabak's cogent explanations of the horrors of the death penalty.¹⁰⁴ Yet, I am not an

102. Hous. Post, Sept. 13, 1994, at A18.

103. Delia M. Rios, *Voters Don't See Women as "Tough on Crime": No Matter How Hard They Try, Female Candidates Can't Shake Stereotypes They are Too Soft to Make Streets Safe*, PLAIN DEALER, Nov. 3, 1994, at 1A; Edward Epstein, *Male Candidates Hope Fear of Crime Will Get Them Elected*, SAN FRANCISCO CHRON., Aug. 29, 1994, at A4.

104. *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239 (1994) (commentary by Ronald J. Tabak) [hereinafter *Politics and the Death Penalty*]; Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness In Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777 (1990-91); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59 (1989); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797 (1986)[hereinafter *Death of Fairness*]; *The Death of Fairness? Counsel Competency &*

abolitionist. I would still maintain, and if I had the time I would make the argument why, that a narrow, pointed, specific death penalty has a value in society. This is not the occasion. What I am saying is make your arguments, but make them in a way that you can win your point. The social worker mentioned how a majority of jurors, when they choose between life and death, choose life. Those are the people who, if you can reach them, will vote against Pataki's bill. You are not going to reach them when you put them out of the moral compass. They can be reached. It takes some subtlety. Try to explain the details, explain the humanity.

But there is something else, and this is a political decision that people have to make. It would take courage to understand the individuals such as myself who are open to the death penalty, including a legislator who says that if you narrow it, if you put in elements that will protect the poor, then I will vote for a death penalty. You need to be able to work with this block of people who want a reasonable death penalty and would fight to sharpen it. We could then have the death penalty and avoid the avoidable horrors.

George H. Kendall: I urge you to go to Albany. I appreciate your remarks, but the problem is that there is no political commitment to having a narrow death penalty. However, it can be developed. I urge you to go and tell people that you can support the death penalty only if it has the fairness provisions in the law. Tragically, there are not a lot of guys up there giving that kind of message.

Al Rodbell: I ran for the Assembly, but I did not win. What I am saying is that the liberals will not articulate this possibility. They only make the statement that they are against it on absolute moral grounds, and they thereby lose the middle ground.

George H. Kendall: The problem is that it is a very slippery slope. We did have a narrow death penalty in New York in 1965. It applied to categories of murder which many people can agree the death penalty should apply to: murders of police officers, lifers who kill. If you go up to Albany today and you walk around the halls and say that that would be an appropriate death penalty for New York, you are going to get laughed out of everyone's office. But I urge you to build a consensus for that, because otherwise that is not what we are going to get.

Ronald J. Tabak: I would also point out that we did not use any of the phrases that you are condemning in the entire three hours we

have been here today. In fact, John Cardinal O'Connor specifically recognized the troubling concerns that people who favor the death penalty have, but His Eminence nevertheless, in very forceful terms, explained why he opposes the death penalty.¹⁰⁵ We have tried, and I think we succeeded through Mr. McDermott and various other speakers, to give *reasons* why the death penalty is a travesty of justice and why it is unfair.

Maybe, there could be some pie-in-the-sky fair death penalty that has never existed in the history of the world, which we could then talk about. I am prepared to talk about it if that ever happens. But I think that in the meantime, we need to get the facts out about what New York State would be buying into if it buys into the death penalty.

Yes.

Audience Member: I would like to respectfully suggest that maybe a more effective way of addressing the issue would not be a forum where you basically make a presentation like this, but a debate and an engagement of discussion between both the proponents and the opponents. My fundamental belief, my philosophy, as a lawyer and as a democratic citizen, is that ultimately the opposition to the death penalty will carry the day when there is an intelligent discussion. I would like to suggest to this Association and other associations that perhaps it would be better to have a series of debates on this issue, with both intelligent opponents as well as intelligent proponents of the death penalty.

Ronald J. Tabak: I think that is a good idea, but I do not think that is the only thing you can do. I personally have engaged in a great many debates concerning the death penalty.

I think that on every debate we should have the same two advocates of the death penalty that they had at the Creative Coalition the other night: Elliot Spitzer, who ran for Attorney General last year,¹⁰⁶ and Ernest van den Haag.¹⁰⁷ They did more to convince people in that group how horrible the death penalty is than anything the people against the death penalty had to say. I agree that we need to confront such people. I have debated both of them. We need to have such events, because when the arguments in favor of the death penalty are developed to their logical conclusions, one

105. See Comments by His Eminence, John Cardinal O'Connor, *supra*, at xx-xx.

106. Kinsey Wilson, *Backroom*, *NEWSDAY*, Sept. 27, 1994, at 33.

107. Former John M. Olin Professor of Jurisprudence and Public Policy at the Fordham University School of Law.

finds simply a demand for vengeance regardless of whether the death penalty deters crime.

On the other hand, there are some occasions in which we prefer to be able, without constant interruptions, to present a coherent discussion of the issues. There is room for both.

Audience Member: I agree that a debate can have a great impact. I watched the recent Firing Line debate on the death penalty.¹⁰⁸ I thought that Ed Koch did absolutely wonderful things for those of us who are against the death penalty when he argued essentially that the reason it is not effective is because it is not implemented enough, and when he was asked what would constitute enough implementation, he said people should be executed consistently with the numbers of people who have been killed. That is appalling. That is genocide. I got a call from a friend of mine who said it was ridiculous that this man was standing there on television saying this.

So, I agree that a debate is an effective forum, although I think that this is effective, also. Frankly, I think those of us who understand the need not to have the death penalty need to get pumped up, too, in some ways. This program is sort of pumping me up a little bit, to go back there and give it the good fight. If anyone has not seen that debate, you should. It just makes me sick.

Ronald J. Tabak: One other reason to have a program like this is that there are many people who oppose the death penalty who are not aware of some of the best arguments against it. For example, a very unfortunate letter to the editor was published by the New York Times a few months ago.¹⁰⁹ It attacked Anna Quindlen for citing the extra cost of the death penalty when opposing the death penalty.¹¹⁰ This letter came not from Newt Gingrich. It came from a civil libertarian, who said that Anna Quindlen's talking about the cost of the death penalty was counterproductive, because the extra cost of the death penalty could be eliminated by getting rid of habeas corpus. Unbeknownst to that civil libertarian, you could eliminate habeas corpus completely and the death penalty would still be far more expensive than the alternative—because the major cost comes from all the extra trials that take place, and the pre-trial activity and the two-phase nature of these trials, most of which end

108. *Firing Line* (televised broadcast, July 1, 1994); see also Walter Goodman, *Death Penalty Debate: A Question of Fairness*, N.Y. TIMES, July 1, 1994, at D16.

109. *A Cynical Argument Against Execution*, N.Y. TIMES, Nov. 29, 1994, at A24.

110. Anna Quindlen, *The High Cost of Death*, N.Y. TIMES, Nov. 19, 1994, at 23.

up in life sentences anyway.¹¹¹ Had the civil libertarian realized that, instead of criticizing Anna Quindlen he would have been praising her. That is an example of how sometimes it is very important to make sure that the people who are against the death penalty know what the facts are. I recently spoke to the board of the New York Civil Liberties Union. When I was done, people asked, "How come we didn't know any of these things?" and, "Unless you come to every one of our sessions on the death penalty, how are we going to know what the arguments are?" That is why we wrote up our fact sheet.

It is very important for people to know that they need to meet with legislators, and that even a small number of people can have a major impact. But they must also know what the arguments are. They can sometimes learn this more coherently in a program of this kind.

Audience member: I have two questions. One is, has there been a competing piece of legislation? It sounds from your discussion like some members or Speaker Silver have actually drafted legislation. Or is that in the formulation stage?

George H. Kendall: Everyone has been very coy about this. There have been ongoing negotiations between Governor Pataki's staff and Speaker Silver's staff. There is no document that has been filed that represents a view from either side.

Audience member: Has there been any assembly member who has taken positions or proposed language or is taking the lead whom you on the panel support or whom you suggest we write to or have community groups put pressure on?

George H. Kendall: Time is of the essence. People ought to make their views about the fairness principles known very, very quickly to Speaker Silver or to anyone you know. There could be a deal very, very soon.

Audience member: Just to follow up on that, in my prior career before entering law I was a political organizer in statewide elections for a number of years. What I am hearing in the room is that a number of people are really quite interested in becoming involved. The question that I have immediately on my mind is which community-based organizations, if any, have you been working with who can plug people into things like a lobby day where people go up to Albany in large numbers—very diverse groups speaking

111. See, e.g., PHILIP J. COOK & DONNA B. SLAWSON, *THE COST OF PROCESSING MURDER CASES IN NORTH CAROLINA*, TERRY SANFORD INSTITUTE OF PUBLIC POLICY, DUKE UNIV. (May 1993).

with a variety of people or tapping into organizations that have lobbyists who really know their way around Albany? It seems like a large coalition using existing structures might be pretty helpful.

Ronald J. Tabak: This Association has a lobbyist in Albany, Jonathan Burnham. The New York Civil Liberties Union has a lobbyist in Albany, Laura Murray. New Yorkers For Fairness in Capital Punishment, which includes both people who favor the death penalty and people who oppose it, but all of whom agree with the fairness principles, have a contact person in New York City, Richard Shroder, the former Consumer Affairs Commissioner. Demi McGuire of New Yorkers Against the Death Penalty is reachable at (518) 465-0707. If you can not find anybody else, you can call me and I will plug you in to somebody. Many of the key members are in Brooklyn or Queens and can be found in their district offices many days of the week.

The best way to find key legislators quickly would be to go up to Albany on a Tuesday. The trip there takes only a few hours. I would love to have Mr. McDermott, Mr. Rodbell and Mr. Rudden come up and speak in Albany right away.

Norman Greene: I would like to make a comment. I noticed that today we have a judge-free and prosecutor-free program. These are, or ought to be, two key types of actors in the debate on the death penalty. Some such people are against the death penalty but could be asked to go against their conscience and participate in a system that enforces it. I know that attempts have been made, and I have been involved in some of them, to get those types of people involved in this process. I think it is worthy of a comment that they just have not to my knowledge participated in this.

Ronald J. Tabak: I think it is worth more than a comment. Justice Bertram Roberts, the former Bronx District Attorney, told Eric Freedman that he very much opposes the death penalty and that if his schedule had permitted it, he would have been here today. But the present district attorney of Brooklyn (who I know is against the death penalty)¹¹² declined to come on the ground that he is involved in negotiations about the language of the death penalty bill. Sadly, that district attorney has proceeded to begin setting up a

112. Nicholas Goldberg & Robin Topping, *Doubts On the Death Penalty*, NEWS-DAY, Mar. 9, 1995, at A5 ("Brooklyn District Attorney Charles Hynes, who says he personally opposes the death penalty but would enforce the law, said he doubted most prosecutors who are personally opposed would rule out seeking it." Bronx District Attorney Robert T. Johnson did, after the law's enactment, rule out seeking the death penalty.).

capital punishment squad in his office even though he opposes the death penalty and even before any legislation has been introduced.

That foreshadows the kind of politicization of our district attorneys, as well as our state judiciary, that is going to take place¹¹³ and has already begun. A few days after the election, a headline in the New York Post warned that Governor Cuomo's supposedly liberal appointees to the Court of Appeals would be a danger to the death penalty.¹¹⁴ So, long before a bill was introduced, people were already attacking the rather moderate to conservative Court of Appeals, in a preemptive strike warning the Court's members that if the court ever strikes down any part of death penalty legislation, they will be thrown off the court, as has been done to judges in California¹¹⁵ and Mississippi¹¹⁶; or else the New York State Constitution will be amended to reverse the court's interpretation of it, as has occurred in New Jersey.¹¹⁷

Audience member: I think one of the aspects that has not really been considered much is the fact that when people are given various options with regard to whether we should have a death penalty, people invariably choose life imprisonment without parole.¹¹⁸ That leads me to suggest that this whole politicization is based upon a misunderstanding on the part of the legislators, who think that by voting for the death penalty they are actually representing what people actually believe, when in fact that is not what people actually believe nor is it what people actually would choose to vote for if they were given an opportunity to consider other types of sentencing. So, I think we should spend more time focusing on what the public really would like to see if they were given an opportunity to vote one way or the other and, I think if we do that, then we will have accomplished some of the things that the gen-

113. See Karen Freifeld, *Just Do Job: Rudy*, N.Y. NEWSDAY, Mar. 9, 1995, at A5 (reporting that Mayor Giuliani had asserted that Bronx District Attorney Johnson would violate the new capital punishment law if he never sought the death penalty).

114. Douglas Kennedy & Philip Messing, *Cuomo's Liberal Judges Will Fight to Keep "The Chair" Unplugged*, N.Y. POST, Nov. 10, 1994, at 3.

115. *The Death of Fairness*, *supra* note 104, at 847.

116. *Politics and the Death Penalty*, *supra* note 104, at 281 n.84.

117. Gene Mustain, *Deadly Delay*, DAILY NEWS, Mar. 5, 1995, at 16, 17 ("The same [victim rights] movement later would persuade voters to approve another [state constitutional] amendment aimed at the state Supreme Court: it said prosecutors in a death penalty case would no longer have to prove a killer's intent . . ."); see also Jay Romano, *Death-Penalty Law Tightened*, N.Y. TIMES, May 17, 1992, § 13NJ, at 1.

118. Jimmy Dunne, *Death Penalty is Not a Deterrent*, HOUS. POST, Jan. 8, 1995, at D3; RICHARD DIETER, *Sentencing for Life, Americans Embrace Alternative to the Death Penalty*, A REPORT BY THE DEATH PENALTY INFORMATION CENTER (April 1993).

tleman before suggested about not making it a moral issue but making it what the consensus of people would want if they were given other options. I think that can be a very, very effective argument.

Ronald J. Tabak: I think it can be, and Governor Cuomo tried to do that. But it is very interesting why life without parole was not adopted when Cuomo was Governor, when it was clear that he was going to successfully veto the death penalty bill. The Republican State Senate leader, the same one with whom Mr. McDermott met who refused to have separate votes on the death penalty and gun control, said that the reason there would be no separate vote on life without parole is that it would pass, Governor Cuomo would sign it into law, and that would diminish support for the death penalty.¹¹⁹ What he really meant is that that would diminish his party's ability to make the phony argument, when running against Governor Cuomo, that the choice is between the death penalty and letting a vicious criminal out of jail in about five or six years to commit another murder.

That is not the alternative even today, even though the State Senate did not vote on life without parole. The alternative even for second degree murder is at least twenty-five years before the prisoner is eligible for parole, and if he has aggravating factors, he may never be eligible for parole.¹²⁰

Why does the public think that the alternative is letting somebody out in a few years to commit other murders? It is because people are let out in a few years after they have committed "homicide" and have then committed other murders or serious crimes. When the press reports those later crimes, it does not say, "By the way, this has nothing to do with the death penalty, because what they were in for was not even second degree murder—it was manslaughter or something less, and the same type of thing happens in states like California which have the death penalty."¹²¹ Do you remember Dan White, who killed Councilman Harvey Milk and Mayor Mosconi of San Francisco?¹²² Dan White got released on

119. Elizabeth Kolbert, *As Vote on Death Penalty Nears, Cuomo Advocates Life Sentences*, N.Y. TIMES, June 19, 1989, at B10.

120. N.Y. PENAL LAW §§ 70.00, 70.40, 125.25 (McKinney 1995).

121. See, e.g., *People v. White*, 172 Cal. Rptr. 612, 615-16 (1981) (criminal defendant convicted of voluntary manslaughter and sentenced to a term of only seven and two-thirds years for killing two people, even though defendant found to be a danger to society).

122. *Id.*; *Talk Back Live* (televised broadcast, Dec. 21, 1994) (transcript on file with the Fordham Urban Law Journal).

parole, and everybody was all upset.¹²³ But most people forgot that White had succeeded with a "Twinky" defense and was found guilty only of manslaughter. Neither the death penalty nor the life without parole alternative to the death penalty is the sentence for manslaughter.¹²⁴

What many death penalty proponents like to do is to make this phony argument, which sounds reasonable due to the press' lack of complete reporting concerning people who are let out on parole in a few years and commit other crimes. Such releases are outrageous. We should find out why they happen and stop them from happening again.

In the case of Arthur Shawcross,¹²⁵ who committed a series of murders after his release, the Rochester district attorney said on a recent program (in which I participated) that his release occurred because an incompetent prosecutor had handled his original prosecution, which had resulted in a conviction for manslaughter. Somebody in the audience then joked, "Maybe the prosecutor should have been given the death penalty if he was so incompetent."

Marilyn A. Kneeland: I am Marilyn Kneeland. I am a lawyer. I work here at the Association. But more importantly for this remark, I live in Brooklyn and I am quite politically active. I think every one of us needs to write our state senator, our state assemblyman, and every assembly person and senator in adjoining districts. I was shocked to hear the other night that Senator Marty Markowitz from Brooklyn is for the death penalty. Many people in his district, which includes at least some of Park Slope which is quite liberal and quite against the death penalty, are unaware of that. I do not think that any of us can conclude that because we think we know our legislators, even if we know them very well, that they do not need persuasion and do not need to be reminded that there are people out there who do not think this is a simple issue and a foregone conclusion. I was shocked to hear that Melinda Katz and Helaine Weinstein need some persuasion on this. So, I think we all should get out our pens and write very simple letters that talk about fairness principles, fiscal impact statements and the need for hearings on these issues.

123. *Weekend Edition* (radio broadcast, Nov. 27, 1993) (transcript on file with the Fordham Urban Law Journal).

124. *White*, 172 Cal. Rptr. at 616.

125. See Rex Smith, *Key Shift on Death Penalty Assemblyman's Vote May be Last One Needed for Override of Veto*, N.Y. *NEWSDAY*, Apr. 20, 1990, at 7 (discussing arrest of Arthur Shawcross, paroled killer and suspect in killings in Rochester area).

Ronald J. Tabak: I also think you should call their offices. Talking about Marty Markowitz, a few years ago when I came to his office, he said that he already knew all the arguments and did not want to hear what I had to say, even though I could give him information on how the death penalty actually works, based on my experience in representing death row inmates.

Marilyn Kneeland: I think people like that are persuadable, despite what he said.

Audience member: The other thing you should say is that you and your friends will support them with money if they are attacked for voting against the death penalty. Some of these Democrats fear that the Republicans are already raising money to run ad campaigns against any Democrat who votes against the death penalty.

Ronald J. Tabak: I should note in that regard that we have a political action committee called Justice-Pac in this state, which supports many death penalty candidates for the Assembly and State Senate. A few years ago, we had our proudest moment when the Albany newspaper had the headline "Support for Death Penalty Fatal for Assemblymen: 2 Democrats Lose Primaries." Those two assemblymen had changed their positions to favor the death penalty.¹²⁶ We beat both of them by putting money in their districts, and we got the actor Roy Scheider to go into Rochester, New York, to campaign for Susan John, who was elected.

We promised to be done by one o'clock. I am told that it is around one o'clock. Thank you very much for coming. We appreciate it.

126. See Robert Borsellino, *Support for Death Penalty Fatal for Assemblymen: 2 Democrats Lose Primaries*, TIMES UNION, Sept. 12, 1990, at 1.